Supreme Court, U.S.
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No. _____
In the Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under § 110 of the Clean Air Act, 42 U.S.C. § 7410, the cost of reducing air pollutant emissions is a relevant and proper factor for the United States Environmental Protection Agency ("EPA") to use in determining whether a state is significantly contributing to another state's failure to attain a national ambient air quality standard.

PARTIES TO THE PROCEEDING

1. Petitioners Michigan, West Virginia, Virginia, Alabama, and South Carolina were petitioners in the court of appeals along with:

In No. 98-1497, State of Michigan, Michigan Department of Environmental Quality, and State of West Virginia, Division of Environmental Protection

In No. 98-1588, State of Ohio

In No. 98-1596, Commonwealth of Virginia

In No. 98-1615, State of Alabama, *ex rel* Bill Pryor, Attorney General

In No. 98-1617, State of Indiana and Indiana Department of Environmental Management

In No. 98-1619, State of North Carolina

In No. 98-1621, State of South Carolina

In No. 98-1499, United Mine Workers of America

In No. 98-1500, Appalachian Power Company, *et al.*, consisting of:

Appalachian Power Company;
Baltimore Gas and Electric Company (now referred to as Constellation Power Source Generation, Inc.);
Carolina Power & Light Company;
Central and South West Services, Inc.
Central Power and Light Company
Public Service Company of Oklahoma
Southwestern Electric Power Company
West Texas Utilities Company
Central Illinois Light Company
Central Illinois Public Service Company
CINergy
Columbus Southern Power Company;
Commonwealth Edison Company
Consumers Energy Company
Dayton Power and Light Company, The
Detroit Edison Company, The
Duke Energy Company
Florida Power Corporation
Illinois Power Company
Indiana Michigan Power Company
Jacksonville Electric Authority

Kentucky Power Company
Kentucky Utilities Company
Louisville Gas and Electric Company
Minnesota Power Company
Monongahela Power Company d/b/a
Allegheny Power System, Inc.
Northern Indiana Public Service Company
Oglethorpe Power Corporation
Ohio Power Company
Ohio Valley Electric Corporation
Oklahoma Gas & Electric Company
Otter Trail Power Company
PacifiCorp Electric Operations
Plains Electric Generation & Transmission
Cooperative, Inc.
Potomac Edison Company, The
d/b/a Allegheny Power System, Inc.
Potomac Electric Power Company
Public Service Company of New Mexico
Salt River Project
South Carolina Electric & Gas Company
Southern Company
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric and Power Company
Tampa Electric Power Company
Tucson Electric Company
Union Electric Company
Virginia Power
West Penn Power Company
d/b/a Allegheny Power System, Inc.
Edison Electric Institute
National Rural Electric Cooperative
Association
American Public Power Association
In No. 98-1500, Duquesne Light Company
In No. 98-1501, Midwest Ozone Group
In No. 98-1502, West Virginia Chamber of Commerce
In No. 98-1504, National Mining Association

In No. 98-1518, West Virginia Manufacturers Association

In No. 98-1556, City of Springfield, Missouri through the Board of Utilities, d/b/a City Utilities of Springfield, Missouri

In No. 98-1567, Kansas City Power & Light Company

St. Joseph Light & Power Company

The Empire District Electric Company

Utilicorp United, Inc.

City of Independence, Missouri

Associated Electric Cooperative, Inc.

In No. 98-1573, Indianapolis Power & Light Company

In No. 98-1585, The Alabama Forestry Association, Inc. by and through its section The Alabama Pulp and Paper Counsel

In No. 98-1590, Dairyland Power Cooperative

In No. 98-1598, South Carolina Public Service Authority doing business as Santee Cooper

In No. 98-1601, American Municipal Power-Ohio

In No. 98-1602, Fort James Operating Company

Gilman Paper Company

Rayonier Inc.

Savannah Electric & Power Company

Southeast Paper Manufacturing Company

International Paper Company

In No. 98-1608, PP&L, Inc.

In No. 98-1609, Council of Industrial Boiler Owners

In No. 98-1611, Network for Workable Air Policies

In No. 98-1616, Georgia Coalition for Sound Environmental Policy, Inc.

In No. 98-1618, Interstate Natural Gas Association of America

In No. 99-1070, Appalachian Power Company, *et al.*

In No. 99-1093, Wisconsin Paper Council

Madison Gas and Electric Company

Northern States Power Company

Wisconsin Public Service Corporation
Wisconsin Manufacturers & Commerce

2. The following Party was a Respondent in the consolidated proceeding, the judgment in which review is sought.

U.S. Environmental Protection Agency

3. The following Parties were Intervenors in the consolidated proceeding, the judgment in which review is sought.

Appalachian Power Company, *et al.*

Dairyland Power Cooperative

Virginia Manufacturers Association

South Carolina Public Service Authority d/b/a Santee Cooper

Detroit Public Lighting
Grand Haven Board of Light and Power
Holland Board of Public Works
Lansing Board of Water & Light
Marquette Board of Light and Power
Michigan South Central Power Agency; and
City of Wyandotte Department of Municipal Service

GPU Generation, Inc.

American Gas Association

Interstate Natural Gas Association of America

Network for Workable Air Policies

Business Council of Alabama

Michigan Manufacturers Association
State of Wisconsin

State of New York

State of Connecticut
State of Maine
State of New Hampshire
Commonwealth of Pennsylvania
State of Rhode Island
State of Vermont; and
Commonwealth of Massachusetts

State of Maryland

Consolidated Edison Co. of New York, Inc.
KeySpan Generation LLC
Niagara Mohawk Power Corporation
PECO Energy Company
Public Service Electric and Gas Company
Rochester Gas & Electric Corporation; and
PG&E Generating

Natural Gas Supply Association; and
Sempra Energy

Associated Industries of Massachusetts
New England Council; and
New Jersey State Chamber of Commerce

PP&L, Inc.
Atlantic City Electric Company; and
Delmarva Power & Light Company

Natural Resources Defense Council
Environmental Law & Policy Center of the Midwest
Clean Air Task Force
American Lung Association of Metropolitan Chicago
Appalachian Mountain Club
Citizens Action Coalition of Indiana, Inc.
Clean Air Council
Environmental Defense Fund
Group Against Smog and Pollution
Hoosier Environmental Council
Illinois Environmental Council
Izaak Walton League of America

Legal Environmental Assistance Foundation
Michigan Environmental Council
National Environmental Trust
Natural Resources Council of Maine
New York Public Interest Research Group
Ohio Citizen Action
Ohio Environmental Council
U.S. Public Interest Research Group; and
Wisconsin's Environmental Decade Institute

Province of Ontario, Canada
Norman W. Sterling, Minister of the Environment, Province of Ontario
Charles A. Harnick, Attorney General of the Province of Ontario; and
Christopher Carl Haromy

4. The following were *Amici* in the consolidated proceeding, the judgment in which review is sought.

Toledo Metropolitan Area Council of Governments

North Carolina Citizens for Business and Industry

South Carolina Chamber of Commerce
Environmental Management Association of South Carolina; and
South Carolina Manufacturers Alliance

Government of Canada

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PETITION FOR WRIT OF CERTIORARI

The states of Michigan, Virginia, West Virginia, South Carolina, and Alabama ("Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000).

OPINIONS BELOW

The majority opinion of the court of appeals and Circuit Judge Sentelle's dissenting opinion (App. 1a-54a) are reported at 213 F.3d 663 (D.C. Cir. 2000), 341 U.S. App. D.C. 306. The orders on the petition for panel and *en banc* rehearing and the court of appeals' mandate are included in the Appendix (App. 55a-60a).

JURISDICTION

The decision of the court of appeals was entered on March 3, 2000. The petitions for rehearing and rehearing *en banc* were denied June 22, 2000. The Court's mandate issued on September 13, 2000. Petitions for writ of certiorari were originally due on September 20, 2000. Upon motion of these Petitioners, this Court, on September 8, 2000, granted an extension until October 20, 2000 (App. 61a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant sections of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, are set forth below:

Clean Air Act § 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D):

> (a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems--

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall -

(D) contain adequate provisions–

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will -

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement).

Clean Air Act § 110(k)(5), 42 U.S.C. § 7410(k)(5):

(k) Environmental Protection Agency action on plan submissions

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall

> notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

Due to its length, only pertinent portions of the EPA rule at issue in this case, 63 Fed. Reg. 57,356 *et seq.*, are set forth in the Appendix at App. 62a-98a. With the Clerk of the Court's permission, complete copies of the rule have been lodged with the Clerk simultaneously with the filing of the petition for writ of certiorari filed by Appalachian Power Company dated September 20, 2000 and captioned *Appalachian Power Company, et al. v. U.S. E.P.A*, No. 00-445.

STATEMENT

Petitioners were among many who petitioned the United States Court of Appeals for the District of Columbia Circuit under § 307(b) of the federal Clean Air Act ("CAA" or "the Act"), 42 U.S.C. § 7607(b), for review of a final EPA rule calling for 22 states and the District of Columbia ("23 States") to revise their state implementation plans ("SIPs") to mitigate the interstate transport of ozone pursuant to § 110 of the CAA, 42 U.S.C. § 7410.[1]

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[1] Henceforth, citations to the Act are to sections of the statute; Table of Authorities includes parallel citations to the United States Code.

1. The Clean Air Act

The CAA created a statutory framework of "cooperative federalism" by defining separate roles for the states and the federal government, acting through the EPA. The EPA is responsible for promulgating NAAQS for air pollutants, while the states are responsible for designing SIPs to achieve those NAAQS. *See* §§ 107, 109, and 110. Each state is required to submit its plan to the EPA which, in turn, "shall approve such submittal as a whole if it meets all of the applicable requirements" of the CAA. *See* §§ 110(a)(2) and 110(k)(3).

2. Ozone Transport Problem

Although the EPA's final rule is intended to reduce the interstate transport of ozone, the rule targets emissions of nitrogen oxides ("NOx"), which are precursors to the formation of ozone. As the EPA explained:

> Ground-level ozone, the main harmful ingredient in smog, is produced in complex chemical reactions when its precursors, volatile organic compounds (VOC) and NOx react in the presence of sunlight. The chemical reactions that create ozone take place while the pollutants are being blown through the air by the wind, which means that ozone can be more severe many miles away from the source of emissions than it is at the source.

63 Fed. Reg. 57,359 (1998) (App. 66a).[2]

3. The NOx SIP Call

One of the statutory requirements for a SIP is that it "contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the state from emitting

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[2] Volatile organic compounds (VOC) reductions are not addressed in the NOx SIP Call because the EPA has adopted other national measures for reducing VOC, *see* 63 Fed. Reg. at 57,363 (1998) (App. 70a-73a), and the EPA believes VOC controls are most effective locally, while NOx controls are more effective in addressing regional ozone problems. *See* 62 Fed. Reg. at 60,320 (1998).

any air pollutant in amounts which will . . . contribute significantly to nonattainment in . . . any other state with respect to any such" NAAQS. § 110(a)(2)(D). If, after approving a SIP, the EPA "finds the applicable implementation plan for any area is substantially inadequate . . . to mitigate adequately . . . interstate pollutant transport . . . or to otherwise comply with any requirement" of the CAA, "the Administrator shall require the State to revise the plan as necessary to correct such inadequacies." § 110(k)(5). Using this authority as its justification, the EPA issued its final rule calling for the 23 States to revise their SIPs to mitigate their interstate transport of ozone in order to comply with § 110(a)(2)(D)'s prohibition of significant pollutant contributions. *See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone; Rule*, 63 Fed. Reg. 57,356, *et seq.* ("NOx SIP Call") (1998).

To address NOx emissions, the EPA's final rule establishes a "NOx budget" for each of the 23 States found to be contributing significantly to the failure of a downwind state to attain the NAAQS for ozone. *See* 63 Fed. Reg. at 57,377-78 (1998) (App. 76a-83a). The NOx budgets set the level of NOx emissions each state is allowed to emit. *See id.*

The first step in the EPA's process was to determine whether the amounts of NOx emitted by each state "contribute significantly" to downwind nonattainment. To do so, the EPA adopted a multi-factor test that considered:

> 1) the overall nature of the ozone problem (i.e., "collective contribution");
> 2) the extent of the downwind attainment problems to which the upwind State's emissions are linked, including the ambient impact of controls required under the CAA or otherwise implemented in the downwind areas;
> 3) the ambient impact of the emissions from the upwind State's sources on the downwind nonattainment problems; and
> 4) *the availability of highly cost effective control measures for upwind emissions.*

63 Fed. Reg. at 57,376 (emphasis added) (1998) (App. 73a). "These factors were the primary components in EPA's consideration." *Id.* "The first three of these factors are related to air quality; the fourth is related to costs." *Id.* In actuality, the EPA used the first three factors to determine which states were to be subject to the rule. The fourth factor was used exclusively by EPA to determine each state's significant contribution of NOx to the downwind states nonattainment of the NAAQS for ozone.

Under the fourth cost-related factor, the EPA calculated NOx budgets for each state by determining the amounts of NOx emissions that may be eliminated by each state through controls that are considered to be "highly cost effective." *See id.* "The EPA determined that an average of approximately $2,000 per ton removed is highly cost effective." *Id.* In the final rule, the EPA explained that:

> Because EPA had . . . determined that the NOx emissions from the affected upwind States have a large and/or frequent impact on downwind nonattainment or maintenance problems, EPA concludes that the amount of NOx emissions from those States that can be eliminated through application of highly cost-effective control measures contributes significantly to nonattainment or maintenance problems downwind.
>
> Under Section 110(a)(2)(D)(i)(I), the SIP must include "adequate provisions prohibiting" sources from emitting these "amounts." *Because no highly cost-effective controls are available to eliminate the remaining amounts of NOx emissions, EPA concludes that those emissions do not contribute significantly to downwind nonattainment or maintenance problems.*

63 Fed. Reg. at 57,378 (emphasis added) (1998) (App. 79a). Accordingly, the remaining amounts of NOx emissions would constitute a state's NOx budget of allowable emissions.

4. The Decision of the Court of Appeals

In approving the EPA's cost-based determination of significant interstate pollutant contributions, the majority of the court of appeals panel stated:

> In sum, there is nothing in the text, structure, or history of § 110(a)(2)(D) that bars EPA from considering cost in its application.

Michigan, 213 F.3d 663, 679. The majority found that "the fundamental dispute is over the clarity of the phrase "contribute significantly." *Id.*, 213 F.3d at 677. The court went on to conclude that the statute's use of the word "significantly" allowed the EPA to consider the costs of emission reductions. *See id.*, 213 F.3d at 677-79. The court also found that the petitioners had failed to point to evidence in the text, statutory structure or legislative history of the CAA "suggesting that cost considerations should be barred," *id.*, 213 F.3d at 679, or showing "the requisite 'clear congressional intent to preclude consideration of cost.'" *Id.* (*quoting Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (*en banc*)).

Petitioners filed a joint petition for rehearing and rehearing *en banc* with the court of appeals. On June 22, 2000, the court denied both requests with Judge Sentelle voting in favor of the petitioner's requests.

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important question of federal law under the CAA in a way that conflicts with the relevant decisions of this Court in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976) ("*Union Electric*") and *Train v. NRDC*, 421 U.S. 60 (1976) ("*Train*"). In doing so, the court of appeals ignores the clear intent of Congress underlying the CAA's interstate pollutant transport provision. The court's decision also conflicts with its previous interpretations of the

CAA in *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999) ("*ATA*"), *cert. granted*, 120 S.Ct. 2003 (No. 1257, 1999 Term) and *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1148-51 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980) "*Lead Industries*"). This Court should grant this petition to resolve these serious conflicts and to remand an EPA rule that exceeds the EPA's statutory authority.

In crafting the CAA, Congress was acutely aware of the Act's potential economic ramifications. The purpose of protecting the public health, however, was expressly intended to override considerations of costs and technology. This Court even went so far as to say at one point in *Union Electric* that where Congress intended cost and technology considerations, it expressly provided for them. *See Union Electric*, 427 U.S. at 257, n. 5. Although, as discussed later, that statement was appropriately modified in other parts of the opinion, there is no room for consideration of costs under the transport provision of § 110(a)(2)(D). By allowing the EPA to insert cost considerations into § 110(a)(2)(D)(i)(I), the court of appeals defeats a clear congressional intent to create "technology-forcing" legislation that places public health above the type of "highly cost effective" means that the EPA now wrongly elevates to supreme status.

The EPA's consideration of costs under § 110(a)(2)(D) is wholly inconsistent with the position the EPA adopted before this Court in the EPA's petition for a writ of certiorari in *ATA*.[3] In that case, the EPA stated that it "cannot consider the economic or technological feasibility of attaining NAAQS" under § 109. *See* EPA's petition for a writ of certiorari at 15 (citing *Lead Industries* at 1148-51: "the statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109"). The EPA's reliance on *Lead Industries* is significant because that decision is ostensibly based upon this Court's precedents in *Train* and *Union Electric*, which held that the "technology-forcing" requirements of the Act "are expressly designed to force regulated sources to develop pollution control devices that might at the time

[3] The EPA's petition was granted by this Court on May 22, 2000. The States of Michigan, Ohio and West Virginia are also parties to that proceeding.

appear to be economically or technologically infeasible." *See Union Electric*, 427 U.S. at 257; *Train*, 421 U.S. at 90-91; *Lead Industries*, 647 F.2d 1149. *Union Electric*, moreover, found that none of the original requirements of § 110(a)(2) appear to permit the EPA to consider technological and economic infeasibility. *See Union Electric*, 427 U.S. at 257;[4] *see also Lead Industries*, 647 F.2d at 1149, n. 37 ("if Congress had wanted the economics of pollution control considered it would have so provided in § 110"). Yet, the EPA proceeded to consider the "economics of pollution control" under the interstate pollution transport provision while relying on *Union Electric's* progeny, in *ATA*, to avoid the consideration of costs under § 109. Clearly, the court of appeals decision in *Michigan* is inconsistent with its decision in *ATA*. *See Michigan*, 213 F.3d at 679; *ATA*, 175 F.3d at 1038. In *ATA*, the court agreed with the EPA that the agency is barred from the consideration of costs, even though those costs are logically relevant to the

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[4] In *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), the Court held that, in the absence of express congressional intent, economic and technological feasibility shall not be considered by EPA in evaluating state implementation plans (SIPs). *See Union Electric*, 427 U.S. at 257. Nevertheless, the Court did suggest that in evaluating whether a state's SIP included provisions for attaining the primary air quality standards "as expeditiously as practicable," as required under § 110(a)(2)(A)(i), the EPA "may consider whether it is economically or technologically possible for the state plan to require more rapid progress than it does." *Union Electric*, 427 U.S. at 265, fn 13. This ancillary and limited consideration of costs, however, does not elevate cost considerations to the level of a minimum standard for a SIP nor can it be inferred that Congress intended such indirect considerations to creep into the other standards under § 110(a)(2). In addition, the *Union Electric* Court held:

> In short, the [1970] Amendments offer ample opportunity for consideration of claims of technological and economic infeasibility. Always, however, care is taken that consideration of such claims will not interfere substantially with the primary goal of prompt attainment of the national standards.

Id., 427 U.S. at 268. For example, § 110(a)(2)(A)'s ancillary consideration of costs helped the EPA, if appropriate, to force a state to attain a NAAQS more promptly than the 3-year, technology-forcing deadline mandated in § 110(a)(2)(A). By contrast, the 1970 interstate transport provision, § 110(a)(2)(E), contained no language that explicitly or implicitly provided for any primary or ancillary consideration of economic or technological feasibility. And the amendments leading to § 110(a)(2)(D) did not change this aspect of the CAA's interstate pollutant transport provision. In the instant matter, not only was the EPA's consideration of cost impermissible, it also interfered substantially with the downwind states' prompt attainment of the national standards by undermining the statute's prohibition of significant contributions by the upwind states.

decision of where to "draw the line" for the ozone NAAQS.[5] In *Michigan*, the court approved the EPA's claim that the agency is free to consider costs, even though those costs are *irrelevant* to determining the "amounts which . . . will contribute significantly" to the nonattainment of NAAQS by downwind states. This petition should be granted to fully resolve these inconsistent decisions and to remand a rule based on wholly irrelevant factors.

The decision in *Michigan* also dismantles the CAA's statutory framework of "cooperative federalism" by approving the EPA's disguised intrusion on the states' primary obligation and right to develop SIPs to bring the states into compliance with the requirements of the CAA. As a result, the significant pollutant contributions that Congress expressly prohibited in § 110(a)(2)(D) will continue by some states while other states have their emissions limited to an extent that is grossly out of proportion to their contributions. By pursuing its own "overall notions of economic fairness," the EPA charts a new and unauthorized course for the CAA that falls short of prohibiting the emission of air pollutants "in amounts which will . . . contribute significantly" to the nonattainment of NAAQS by downwind States.

It is clear that Congress required each state to eliminate its own significant contributions, regardless of the costs. The EPA, as affirmed by the court of appeals, now seeks to legislate a different policy for nearly half of the nation. Regardless of what one might think of the choices Congress has made to address air quality problems, this Court has repeatedly held that it is not for an administrative agency or the courts to second-guess that choice. This petition should be granted to correct the executive and judicial branches' trespass upon the exclusive province of Congress.

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5 Ozone is a "non-threshold" pollutant. There is no threshold amount for ozone above which deleterious health effects are certain and below which no health effects are known. "EPA regards ozone definitely . . . as [a] non-threshold [pollutant], *i.e.*, [one that has] some possibility of some adverse health impact (however slight) at any exposure level above zero." *ATA*, 175 F.3d at 1034, *citing* Ozone Final Rule, 62 Fed. Reg. at 38,863 (1997).

1. Under the plain language of § 110(a)(2)(D)(i)(I), the cost of reducing air emissions is neither a relevant nor proper factor for the EPA to consider in determining the "amount" of a state's emissions that "contribute significantly" to another state's failure to attain a national air quality standard.

In the CAA, Congress expressly called for the EPA and the states to prohibit "any source or other type of emissions activity within [a] State . . . from emitting *any air pollutant in amounts which will . . . contribute significantly*" to another state's failure to attain national ambient air quality standards. § 110(a)(2)(D)(i)(I) (emphasis added). The court of appeals confirmed that "the fundamental dispute is over the clarity of the phrase 'contribute significantly.'" *Id.*, 213 F.3d at 677. The court went on to conclude that the statute's use of the word "significantly" allowed the EPA to consider the costs of emission reductions. *See id.*, 213 F.3d at 677-79.

As Judge Sentelle points out in his dissent, the meaning of the statute is plain:

> Given § 7410(a)(2)(D)(i)(I)'s mandate as a whole, it becomes clear that EPA and the majority have to contort the statute's language by isolating the term "significantly" and ignoring the terms "air pollutant," "amounts," and "contribute" in order to work cost considerations into the statute. I just cannot agree with such an unusual exercise in statutory construction.

Michigan, 213 F.3d at 696-97 (quotation marks added). He also explained that:

> Unlike the majority's journey through this regulatory scheme, mine is neither lengthy nor complex, because I get off at the first stop.

Michigan, 213 F.3d at 695. "The first stop" Judge Sentelle referred to was a rational reading of the plain language of the statute's text:

> It would appear to me that Congress clearly empowered the EPA to base its actions on amounts of pollutants, those amounts to be measured in terms of significance of contribution to downwind attainment. Instead, EPA has chosen, doubtless in the pursuit of beneficent ends, to assert authority to require the SIPs to contain provisions based not on the amounts of pollutants, nor even on the relative significance of the contributions of such pollutants to downwind nonattainment, but on the relative cost effectiveness of alleviation. I agree with the State petitioners that it is undeniable that EPA has exceeded its statutory authority.
>
> * * * *
>
> I marvel at an interpretation that permits cost effectiveness to find a place in a statutory provision addressing amounts of air pollutant contribution. While the contribution must affect nonattainment significantly, no reasonable reading of the statutory provision in its entirety allows the term significantly to springboard costs of alleviation into EPA's statutorily-defined authority.

- *Michigan*, 213 F.3d at 695-97 (Sentelle, J., dissenting) (quotation marks added) (App. 51a-54a).

Congress instructed the EPA to look at pollutant amounts, not dollar amounts. Based on its own misguided notion of economic fairness, EPA, contrary to the plain language of the Act, chose to determine each state's required NOx reduction based solely on costs. Because the cost of alleviation is wholly irrelevant to determining the pollutant amounts that are causing the problem in need of alleviation, the rule is not "founded on a reasoned evaluation 'of the relevant factors'" and, therefore, is arbitrary and capricious.

See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

The plain language of § 110(a)(2)(D)(i)(I) should have resolved this matter at "the first stop." If it is necessary to look beyond the language of the statute itself, the legislative history of the term "contribute significantly" confirms the error of the statutory interpretation by EPA and the court of appeals. In the 1990 amendments, Congress explained its change from the term "prevent attainment" to "contribute significantly to nonattainment":

> For interstate pollution to violate current law, it must "prevent attainment." Since it may be impossible to say that any single source or group of sources is the one which actually prevents attainment, the bill changes "prevent attainment or maintenance" to "contribute significantly to nonattainment or interfere with maintenance by," thus clarifying when a violation occurs.

S. Rep. No. 228, 101st Cong., 1st Sess. 21 (1989), *as reported in* 1990 U.S.C.C.A.N. 3385, 3407. The term "contribute significantly" was intended by Congress to strengthen the prohibition on contributions to interstate pollution, not to allow some states to escape the Act's reach because their required emission reductions will cost more than $2,000/ton. There is no evidence of any congressional intent to inject cost considerations into § 110(a)(2)(D)(i)(I). This provision lacks any language that explicitly or implicitly authorizes economic considerations. The word "significantly" goes to the level of the impact and cannot reasonably be interpreted to allow the consideration of economic efficiency.

Despite the plain language of the statute, the rule provides that a state's significant contribution is not determined by the "amounts" of pollutants in its emissions as required by Congress. Instead, EPA declares that a state's significant contribution is the total amount of the state's emissions that can be eliminated for $2,000/ton or less. As a result, a state which is contributing a large amount of pollutants to another state's failure to attain air quality

standards will not have to reduce its emissions one iota if doing so will cost more than $2,000/ton. On the flip side, a state which is barely making any contribution is required to eliminate an amount of emissions that equals the total of all the emissions that would cost $2,000 or less to eliminate. Under EPA's view, it does not matter whether that amount is grossly out of proportion to a state's contribution. In effect, the EPA shifts the burden of cleaning the air from states with large pollutant contributions to states with small contributions simply because the latter happen to have cost-efficient reductions available in excess of what they need to eliminate their small contributions. In doing so, EPA greatly exceeds its statutory authority.

2. The decision below allowing EPA's consideration of costs conflicts with this Court's decision in *Union Electric* that, in the absence of congressional intent, economic and technological infeasibility shall not be considered by the EPA under § 110(a)(2).

In *Union Electric,* this Court reviewed the Clean Air Act Amendments of 1970 including the interstate pollution transport provision, § 110(a)(2)(E), from which the current § 110(a)(2)(D) evolved. *See Union Electric,* 427 U.S. at 250, n. 1. This Court expressly addressed the EPA's consideration of economic and technological feasibility under § 110(a)(2). *See id.,* 427 U.S. at 257. This Court examined all the requirements of § 110(a)(2) and held:

> After surveying the relevant provisions of the Clean Air Amendments of 1970 and their legislative history, we agree that Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a state implementation plan.

Union Electric, 427 U.S. at 256.[6] As mentioned above, the original 1970 interstate pollution provision was § 110(a)(2)(E).[7] It was amended in 1977[8] and again, in 1990, when it was moved to § 110(a)(2)(D).[9] The history of this provision, as discussed in more detail below, is material, for in *Michigan*, the majority of the court of appeals panel stated:

> In sum, there is nothing in the text, structure, or history of § 110(a)(2)(D) that bars EPA from considering cost in its application.

Michigan, 213 F.3d at 679. In *Union Electric*, however, this Court reviewed § 110(a)(2)'s eight specified criteria against which the EPA would evaluate SIPs for approval. *See id*. At that time, § 110(a)(2) provided that the Administrator "shall approve" the proposed plan if it has been adopted after public notice and hearing and if it meets the eight specified criteria. *See id.* 427 U.S. at 250. Today, the same "shall approve" language is now found in § 110(k)(3). ("[T]he Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter.") This Court held that the "mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than than those specified, [cite omitted] . . . and *none of the eight factors appears to permit consideration of technological or economic infeasibility*. [Footnote omitted.]" *Union Electric*, 427 U.S. at 257 (emphasis added).

One of the eight criteria reviewed in *Union Electric* was § 110(a)(2)(E), which required that a SIP contain:

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6 This statement by the Court holds true for the CAA's interstate pollutant transport provision (then § 110(a)(2)(E), now § 110(a)(2)(D)). As discussed in footnote 4, *supra*, the *Union Electric* Court did permit the EPA to consider economic and technological infeasibility, under § 110(a)(2)(A), in the EPA's determination of whether a SIP included provisions to achieve NAAQS as "expeditiously as practicable." *Union Electric*, 427 U.S. at 265. The interstate pollutant transport provision, however, was then found in § 110(a)(2)(E) and contained no language explicitly or implicitly permitting even ancillary consideration of economic feasibility by the EPA.

7 *See* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 110(a)(2), 84 Stat. 1676 (1970).

8 *See* Clean Air Act Amendments of 1977, Pub. .L. No. 95-95, § 108(a)(4), 91 Stat. 685, 693 (1977).

9 *See* Clean Air Act Amendments, Pub. L. No. 101-549, § 101(b), 104 Stat. 2399, 2404 (1990).

> . . . adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will *not interfere with the attainment* or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region.

Id., 427 U.S. at 250, n. 1 (emphasis added). Upon reviewing the eight criteria, this Court found that:

> These requirements are of a "technology-forcing character," *Train v. NRDC, supra*, at 91, [cite omitted] and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.

Id., 427 U.S. at 257. In direct contravention of the statute's design, the EPA's new rule fails to force emission reduction measures that are not "highly cost effective." As discussed below, if the EPA was barred from reading cost considerations into the original § 110(a)(2)(E) when approving SIPs, it also must be barred from injecting cost considerations into today's § 110(a)(2)(D).

In adopting the 1977 Amendments, Congress affirmed *Union Electric's* resolution of what Congress considered to be a "fundamental dispute under the act":

> This . . .dispute relates to two questions. The first is whether or not the Administrator is authorized (or required) to disapprove a State plan, because it is "economically or technologically infeasible" or because "it does not reflect the most cost-effective system" for attaining and maintaining the national ambient air quality standards. That question has now been settled by the Supreme Court in *Union*

> *Electric Co. v. EPA*, 427 U.S. 246 (1976), and the committee takes no issue with the holding of that case.

H.R. Rep. No. 294, 95th Cong., 1st Sess., at 56 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1134. Under its new rule defining "significant contribution" in terms of "highly cost effective" emission reduction measures, the EPA ignores congressional intent. The EPA's rule rests upon cost factors Congress did not intend the agency to consider.

Since Congress affirmed the *Union Electric* decision, no amendments to the interstate pollutant transport provision have occurred that undercut the premise of *Union Electric*. "Enacted more than a quarter of a century ago, § 110 has gone through many changes, but its basic structure has survived." *Commonwealth of Virginia v. EPA*, 108 F.3d 1397, 1406 (D.C. Cir. 1997). "The 1990 amendments were the most comprehensive since 1970, but the changes to § 110, at least as they concern EPA's approval of State Plans, were predominantly of syntax, not substance." *Id.*, 108 F.3d at 1409. A careful review of the CAA's subsequent amendments and legislative history is vital to understanding how *Union Electric* is dispositive of this appeal.

In the 1977 amendments, § 110(a)(2)(E) was amended to require, in relevant part, that a SIP contain:

> . . . adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) *prevent* attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard . . . .

Clean Air Act Amendments of 1977, Pub. L. 95-95, § 108(a)(4), 91 Stat. 685, 693 (1977) (emphasis added). In essence, the prohibited impact level of pollutant emissions was changed from amounts that will "interfere with attainment" to amounts that will "prevent attainment." Clearly, no congressional intent to inject cost considerations can be inferred here. In the 1990 amendments, § 110(a)(2) was amended again and re-ordered to now include thirteen

criteria, including § 110(a)(2)(D), which requires, in relevant part, that a SIP:

> (D) contain adequate provisions-
>
> (i) prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will-
>
> (I) *contribute significantly* to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard . . . .

Clean Air Act Amendments, Pub. L. No. 101-549, § 101(b), 104 Stat. 2399, 2404 (1990) (emphasis added). As mentioned above, in adopting the amendment, Congress explained its change from the term "prevent attainment" to "contribute significantly to nonattainment":

> For interstate pollution to violate current law, it must "prevent attainment." Since it may be impossible to say that any single source or group of sources is the one which actually prevents attainment, the bill changes "prevent attainment or maintenance" to "contribute significantly to nonattainment or interfere with maintenance by," thus clarifying when a violation occurs.

S. Rep. No. 228, 101st Cong., 1st Sess. 21 (1989), *as reported in* 1990 U.S.C.C.A.N. 3385, 3407. The term "contribute significantly" was intended by Congress to reach more sources and not to allow some sources to escape the provision's prohibition just because their required emission reductions are not "highly cost effective." The same Senate Report quoted above stated:

> In summary, the nonattainment provisions of the bill are designed to bring about emission reductions from *all* the major sources that contribute to ozone . . . pollution . . . .

Id., at 13, 1990 U.S.C.C.A.N. at 3399 (original emphasis). The EPA's rule allows some major contributing sources to escape reductions because their available reduction measures are not "highly cost effective."

The changes in the 1977 and 1990 amendments, from "interfere with the attainment" to "prevent attainment" to "contribute significantly to nonattainment," do not undermine the premise of *Union Electric*. They only refer to the level of pollution impact that will result in a violation of the CAA. Considerations of costs remain "wholly foreign" to the EPA's administration of § 110(a)(2)(D)(i)(I). *Union Electric* is still the controlling decision of this Court. Thus, the court of appeals' decision is in direct conflict with this Court's precedent and warrants reversal.

3. The court of appeals' decision directly conflicts with its own precedents in *ATA* and *Lead Industries*.

The NOx SIP Call rule is of nationwide effect, directly impacting the eastern half of the nation. The rule also implicates statutory interpretation issues regarding the CAA's interstate pollution transport provision that will have ramifications for the entire nation. Any EPA actions, under § 110, that are of nationwide scope or effect can only be reviewed by the D.C. Circuit. *See* § 107(b)(1). Accordingly, conflicts between the CAA decisions of the D.C. Circuit are on par with conflicts between the different circuits and, when the D.C. Circuit fails to reconcile serious conflicts between its decisions, this Court should do so. This Court should resolve the clear conflicts between *Michigan*, *Lead Industries* and *ATA*.

In *ATA*, the court of appeals held:

> Cost-benefit analysis, mentioned as a possibility in *Lockout/Tagout I*, 938 F.2d at 1319-21, is not available under decisions of this

> court. Our cases read 109(b)(1) as barring EPA from considering any factor other than "health effects relating to pollutants in the air." *NRDC*, 902 F.2d at 973; *see also Lead Industries*, 647 F.2d at 1148; *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C.Cir.1998); *American Petroleum Inst.*, 665 F.2d at 1185 (echoing the same themes).

In seeking a writ of certiorari in *ATA*, the EPA specifically relied upon *Lead Industries* when EPA states that it "cannot consider the economic or technological feasibility of attaining NAAQS" under § 109. *See* Petition for a writ of certiorari, at 15. The *Lead Industries* court held that "the statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead Industries*, 647 F.2d at 1148. In reaching this conclusion, the *Lead Industries* court reviewed § 110 also, stating:

> [Section] 110, 42 U.S.C. § 7410, provides that once ambient air quality standards have been promulgated, each state must prepare and submit an implementation plan outlining the measures to be taken to ensure that the standards are met. It is these state implementation plans which actually impose pollution control requirements and, consequently, *if Congress had wanted the economics of pollution control considered it would have so provided in § 110.*

Id., 647 F.2d at 1149, n. 37 (emphasis added).

The holdings in *Lead Industries* are ostensibly based upon, and cite, this Court's precedents in *Train* and *Union Electric*, which held that the "technology-forcing" requirements of the Act "are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." *See Union Electric*, 427 U.S. at 257; *Train*, 421 U.S. at 90-91; *Lead Industries*, 647 F.2d at 1149.

In addition to the conflict between the D.C. Circuit's decisions on CAA rules of nationwide effect, there are issues common to *ATA* and *Michigan* that warrant the granting of this petition for certiorari. EPA's statutory authority to consider economic feasibility is implicated in both cases. EPA argues in *ATA* that costs cannot be considered under § 109, but in *Michigan*, EPA did consider costs under § 110. Two of the state petitioners herein, Michigan and West Virginia, argue as respondents in *ATA* that costs can be considered under § 109, but argue herein that costs cannot be considered under § 110.[10] In *ATA*, the court agreed with the EPA that the agency was barred from the consideration of costs, even though § 109 impliedly, if not expressly, allows for such and even though those costs are logically relevant to the decision of where to "draw the line" for the ozone NAAQS.[11] In *Michigan*, on the other hand, the court approved the EPA's claim that the agency was free to consider costs, even though § 110(a)(2)(D) neither expressly nor impliedly allows for such and even though those costs are wholly *irrelevant* to determining the "amounts which . . . will contribute significantly" to the nonattainment of NAAQS by downwind states. This petition should be granted to fully resolve these inconsistent decisions. In *ATA* this Court is asked to consider if the prohibition of the EPA's consideration of costs, in the absence of express statutory authorization under the CAA, is absolute. If it is not absolute, guidance from this Court is needed as to whether an exception exists for those situations, like in *ATA*, where no other relevant factors except economic or technological feasibility are available for establishing a reasoned basis for delineating a standard, either for air quality or for SIPs. Petitioners believe that such an exception may be made if economic and technological feasibility are relevant to a decision and indispensable in providing a reasoned basis for the agency's action. In *Michigan*, these prerequisites are completely lacking and this Court should set the decision aside.

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[10] The states of Alabama, South Carolina and Virginia are not petitioners in *ATA* and therefore, have not taken any position regarding the applicability of costs under §109.

[11] *See* Brief of states of Ohio, Michigan and West Virginia in Support of Cross-Petitioners in *ATA*.

4. The EPA's calculation of state emission budgets based on costs, as approved by the court of appeals, conflicts with principles of state sovereignty found in the Clean Air Act's statutory framework of cooperative federalism, as found in *Train v. NRDC*, 421 U.S. 60, 79 (1976), by intruding upon each state's obligation and right to revise its plan "as necessary" to adequately mitigate interstate pollutant transport.

This Court should consider how EPA's rule affects Indiana, Pennsylvania and New York City. Indiana and Pennsylvania both contribute air pollutants which interfere with New York City's attainment of the national air quality standard for ozone. Indiana is estimated to contribute a maximum of 6 parts per billion ("ppb") of ozone to New York City. *See* 63 Fed. Reg. 57,393 (1998) (App. 92a). Pennsylvania is estimated to contribute a maximum of 25 ppb of ozone to New York City. *See* 63 Fed. Reg. 57,392 (1998) (App. 89a). EPA considers both contributions significant enough to bring both Indiana and Pennsylvania under the EPA's new rule to eliminate significant contributions. At first blush, EPA's construction seems to function.[12] In application, however, EPA's rule delivers a result that is at odds with the intent of Congress. Under the new rule challenged here, both states will be required to eliminate all emissions that can be

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12 Here Petitioners assume *arguendo* that the EPA properly established an amount threshold in determining whether a state contributes significantly to nonattainment by downwind states. This threshold appears to be a contribution of 2 ppb ozone and/or a four episode average percent contribution of less than one percent ozone due to manmade emissions. *See* EPA Brief at 43, n. 32; *see also* 63 Fed. Reg. 57,393-94 (App. 92a-98a) (Group 3 states all contribute "less than 2 ppb to 1-hour daily maximum exceedances in New York City" and are not included among the twelve states contributing significantly to the New York City nonattainment area). The EPA, however, failed to provide a reasoned basis for selecting these "screening criteria," which establish an unreasonably low threshold.

eliminated for $2,000/ton or less.[13] As a result, modeling shows that Pennsylvania's projected contribution to New York City's problems will be reduced only to 19 ppb, Joint Appendix in D.C. Cir. Case No. 98-1497 at 02036a,[14] but it will no longer be considered "significant" by the EPA because the remaining contributions cannot be eliminated in a "highly cost effective" manner. Indiana, on the other hand, may be required to eliminate emissions far in excess of what may be "necessary" to eliminate its smaller contribution to New York City. While a contribution of 6 ppb is considered significant enough to require Indiana to drastically reduce its emissions, a contribution of 19 ppb will no longer be considered significant enough to require Pennsylvania to further reduce its emissions. In this way, the least offending state is burdened with the most offending state's responsibility to reduce its significant contribution to a common neighbor's pollution woes.[15] Moreover, nowhere in the rule does the agency show that its plan will accomplish the congressional goal of prohibiting all *truly* significant contributions by the upwind states. And

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13 The EPA failed to provide a reasoned basis for its selection of $2,000/ton as the upper limit for defining "highly cost effective" emission reduction measures. The EPA merely states that "[b]y examining the cost effectiveness of recently promulgated or proposed NOx controls, EPA determined that an average of approximately $2,000 per ton removed is highly cost effective." 63 Fed. Reg. 57,377-78 (1998) (App. 76a-83a). Even if the EPA's cost considerations were permissible, because the agency's path in selecting $2,000/ton cannot be reasonably discerned, it is arbitrary and capricious. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). The EPA also failed to establish what rate would be "cost effective" prior to declaring $2,000/ton "highly cost effective." As even the court of appeals recognized:

> [The EPA] neither rests that benchmark on anything in the language or function of § 110(a)(2)(D)(i)(I), nor otherwise explains why the resulting cut-off point represents the right degree of "cost-effectiveness" (i.e., why "highly cost-effective" should be at that "height"). Accordingly, we must read the EPA as having understood that its selection of the cut-off point was essentially unbounded.

Michigan, 213 F.3d at 680. Here, the court of appeals also errs by failing to find the EPA's reliance on the figure of $2,000/ton to be arbitrary and capricious.

14 This modeling was performed for the Southeast Michigan Council of Governments ("SEMCOG").

15 This anomaly is especially disturbing in light of the EPA's acknowledgement that ozone benefits from reducing upwind emissions *decrease with distance*. *See* 63 Fed. Reg. 57,381 (1998) (App. 86a).

nowhere in the CAA or its legislative history does Congress contemplate or authorize such a drastic shifting of burdens from one state to another. The EPA's rule exceeds its statutory authority, defeats the "technology-forcing" intent of Congress and deeply offends principles of state sovereignty and individual responsibility.

The court of appeals clearly failed to substantively review the EPA's application of the requirements and limitations of § 110(k)(5), which the EPA relied upon for its authority to issue the NOx SIP Call. Section 110(k)(5) provides that:

> Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate . . . to mitigate *adequately* . . . interstate pollutant transport . . . or to otherwise comply with any requirement of this chapter, the Administrator shall require *the State* to revise the plan *as necessary to correct such inadequacies.*

Section 110(k)(5) (emphasis added). In *Union Electric*, when reviewing the 1970 version of § 110(a)(2)(B), this Court held that "the most natural reading of the '*as may be necessary*' phrase in context is simply that the Administrator must assure that the minimal, or '*necessary*,' requirements are met." *Union Electric*, 427 U.S. at 263. In the scenarios of Indiana and Pennsylvania, *supra*, the EPA's new rule may require Indiana to revise its plan more than is "necessary" to correct Indiana's inadequacies. By contrast, Pennsylvania will not be required to fully revise its plan "as necessary" to correct all of its inadequacies. Instead, the EPA has, in effect, determined that some revisions necessary to correct Pennsylvania's inadequacies are not "highly cost effective" and, therefore, those remaining inadequacies will not be considered "substantially inadequate."[16] The illogical result is that an original implementation plan which allows a state to

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16 Petitioners acknowledge that this argument is substantially similar to its previous arguments regarding § 110(a)(2)(D)(i)(I), but this argument logically follows from the EPA's determination of what constitutes a state's significant contribution. Moreover, § 110(k)(5)'s clear language confirms the EPA's flawed approach to significant contributions and illustrates this rule's impermissible impact on the statutory framework of "cooperative federalism."

contribute 6 ppb is "substantially inadequate," but a revised plan which allows a state to contribute 19 ppb is not considered by the EPA to be "substantially inadequate." By requiring some states to do more than Congress intended while allowing other states to do less, the EPA impermissibly undermines the statutory framework of "cooperative federalism" that is the centerpiece of the CAA. In *Train*, this Court held that:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are *necessary* if the national standards it has set are to be met .... The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which *satisfies* the standards of § 110(a)(2) .... Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.

Train, 421 U.S. at 79 (emphasis added). EPA has no authority to simultaneously require a state to do more than is "necessary" to eliminate its significant contribution to the nonattainment of downwind states. Nor may the EPA allow some states to do less than is "necessary" to "satisfy" the prohibition in § 110(a)(2)(D).

5. The court of appeals erred in allowing the EPA's "overall notions of economic fairness" to change the substantive obligations of the states as fixed by Congress.

EPA states that its rule is based on EPA's notion of economic fairness. The "secondary aspects of EPA's analysis" included:

> * The overall fairness of the control regimes required of the downwind and upwind areas, including the extent of the controls required or implemented by the downwind and upwind areas.
> * General cost considerations, including the relative cost-effectiveness of additional downwind controls compared to upwind controls.

63 Fed. Reg. 57,376 (1998) (App. 73a). Together with EPA's primary consideration of "the availability of highly cost effective control measures for upwind emissions," *id.*, the EPA charters a new and unauthorized course for the CAA by establishing a "fairness" policy that Congress neither contemplated nor authorized. The agency states in its rule that:

> EPA believes that *overall notions of fairness* suggest that upwind sources which contribute significant amounts to the nonattainment problem should implement cost-effective reductions. When upwind emitters exacerbate their downwind neighbors' ozone nonattainment problems, and thereby visit upon their downwind neighbors additional health risks and potential clean-up costs, EPA considers it fair to require the upwind neighbors to reduce at least the portion of their emissions for which highly cost-effective controls are available.

63 Fed. Reg. 57,379 (1998) (emphasis added) (App. 83a). Remarkably, by merely restating, in a judgmental tone, the interstate pollution problem Congress already recognized, the EPA then attempts to usurp the role of the legislature by devising its own corrective action instead of pursuing the remedy Congress expressly prescribed. The EPA also presumes Congress did not consider "overall notions of fairness" when it enacted the CAA. This is not the case. The *Union Electric* Court found that:

> Technology forcing is a concept somewhat new to our national experience and it necessarily entails certain risks. But Congress considered those risks in passing the 1970 Amendments and decided the dangers posed by uncontrolled air pollution made them worth taking. Petitioner's theory [of allowing claims of economic and technological infeasibility] would render that considered legislative judgment a nullity, and that is a result we refuse to reach.

Union Electric, 427 U.S. at 269. Here, too, in *Michigan*, the court of appeals decision threatens to render Congress' legislative judgment a nullity by allowing cost considerations to undermine the statutory prohibition on significant pollutant contributions. The EPA's "fairness" policy exceeds its statutory authority and the court of appeals decision is tantamount to a grant of unbridled discretion to the EPA to do as it sees fit. This Court should not allow such a precedent to stand.

The court of appeals also failed to adequately consider the greater public health benefits of the full statutory prohibition of *truly* significant contributions as compared to the more limited benefits of the EPA's rule. By using cost considerations to limit required emission reductions, the EPA falls short of minimizing the adverse effects of ground level ozone as Congress intended. As the EPA found:

> At ground level, ozone can cause a variety of ill effects to human health, crops and trees. Specifically, ground-level ozone has been shown in clinical and/or epidemiological studies to have the following health effects:
>
> * Decreased lung function, primarily in children active outdoors.
> * Increased respiratory symptoms, particularly in highly sensitive individuals.
> * Hospital admissions and emergency room visits for

> respiratory causes among children and adults with pre-existing respiratory disease such as asthma.
> * Inflammation of the lung.
> * Possible long-term damage to the lungs or even premature death.

63 Fed. Reg. 57,359 (1998) (67a-68a). It was these serious health effects from pollutants like ozone that led Congress to resort to the "technology-forcing" design of § 110(a)(2)(D). Congress was aware of the extent of this problem, and acted to address it. An EPA rule affecting nearly half the nation cannot be allowed to fall short of the goal established by Congress, especially in the portion of the country where ozone problems are most severe. Accordingly, this Court should grant this petition and quickly return the EPA to the path Congress has chosen, as difficult or unwise as the EPA may believe that path to be. In the long run, the nation's air quality and the public health should realize greater protection and improvement.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October, 2000

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Argued November 9, 1999 Decided March 3, 2000

No. 98-1497

State of Michigan,
Michigan Department of Environmental Quality and
State of West Virginia, Division of
Environmental Protection,
Petitioners

v.

U.S. Environmental Protection Agency,
Respondent

New England Council, Inc., et al., *Intervenors*

Consolidated with
98-1499, 98-1500, 98-1501, 98-1502, 98-1504, 98-1518,
98-1556, 98-1567, 98-1573, 98-1585, 98-1588, 98-1590,
98-1596, 98-1598, 98-1601, 98-1602, 98-1608, 98-1609,
98-1611, 98-1615, 98-1616, 98-1617, 98-1618, 98-1619,
98-1621, 99-1070, 99-1093

On Petitions for Review of an Order of the Environmental Protection Agency

James E. Doyle, Attorney General, State of Wisconsin, and Philip Peterson and Thomas L. Dosch, Assistant Attorneys General, were on the brief for intervenor State of Wisconsin.

Louis E. Tosi and William L. Patberg were on the brief for amicus curiae Toledo Metropolitan Area Council of Governments.

Susan E. Ashbrook, Assistant Attorney General, State of Ohio, James C. Gulick, Special Deputy Attorney, State of North Carolina, Andrea B. Field, Theodore L. Garrett, Todd Palmer, Jonathan S. Martel, William F. Pedersen and Scott H. Segal argued the causes for petitioners. With them on the briefs were Betty D. Montgomery, Attorney General, State of Ohio, Andrew S. Bergman, Assistant Attorney General, Michael F. Easley, Attorney General, State of North Carolina, J. Allen Jernigan, Special Deputy Attorney General, James P. Longest, Jr., and Amy R. Gillespie, Assistant Attorneys General, Bill Pryor, Attorney General, State of Alabama, Tommy E. Bryan, Assistant Attorney General, Jeffrey Modisett, Attorney General, State of Indiana, Daniel B. Dovenbarger, Chief Counsel, Jennifer M. Granholm, Attorney General, State of Michigan, Thomas Casey, Solicitor General, Alan F. Hoffman, Assistant Attorney General, Charles M. Condon, Attorney General, State of South Carolina, Mark E. Earley, Attorney General, State of Virginia, Roger L. Chaffe, Senior Assistant Attorney General, Stewart T. Leeth, Assistant Attorney General, Thomas H. Zerbe, Senior Counsel, State of West Virginia, Samuel L. Finklea, III, Grant Crandall, Eugene M. Trisko, Norman W. Fichthorn, Mel S. Schulze, David M. Flannery, Kathy Beckett, Harold P. Quinn, Jr., Michael D. Hockley, J. Lister Hubbard, R. Brooke Lawson, III, Robert E. Lannan, II, Terry J. Satterlee, Alok Ahuja, Mark E. Shere, Bryan G. Tabler, Jeffrey L. Landsman, Jennifer S. McGinnity, Howard E. Shapiro, Margaret Claiborne Campbell, Thomas E. Knauer, David R. Straus, Deborah E. Jennings, Julie R. Domike, Patricia T. Barmeyer, Lisa G. Dowden, Brian J. Renaud, Rhonda L. Ross, Jeffrey F. Cherry, Katherine L. Rhyne, John M. Koeppl, Henry J. Handzel, Jeffrey A. Knight, Joan Dreskin, Kevin B. Belford, Pamela A. Lacey, Gene E. Godley, Michael H. Levin and Edmund B. Frost. Earle D. Getchell, Jr., Neal J. Cabral, Christopher D. Man, Jacqueline H. Fine, Jon S. Faletto and John P. Proctor entered appearances.

Charles S. Carter and Deborah Ann Hottel were on the brief of amici curiae South Carolina Chamber of Commerce, Environmental Management Association of South Carolina, South Carolina Manufacturers Alliance, and South Carolina Farm Bureau Federation.

Jon M. Lipshultz and Patricia R. McCubbin, Attorneys, U.S. Department of Justice, argued the causes for respondent.

With them on the brief were Lois J. Schiffer, Assistant Attorney General, and Jan Tierney, Howard Hoffman, Amey W. Marrella and Dwight C. Alpern, Attorneys, U.S. Environmental Protection Agency.

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Kathleen L. Millian argued the cause for intervenor Her Majesty the Queen in Right of Ontario (Province of Ontario, Canada). With her on the brief was Bruce J. Terris.

David Hawkins and Raissa Griffin were on the brief for intervenor Natural Resources Defense Council, et al. Andrew P. Caputo entered an appearance.

Patrick M. Raher, John G. Roberts, Jr., Catherine E. Stetson, Michael R. Barr, Michael A. Conley, Theresa Fenelon Falk, John H. Sharp, Paul G. Wallach and Kenneth R. Meade were on the brief for industry intervenors.

Richard A. Wegman was on the brief for intervenor the Government of Canada.

Before: Williams, Sentelle and Rogers, Circuit Judges.

Opinion Per Curiam.*

Dissenting opinion filed by Circuit Judge Sentelle.

Introduction

Under the Clean Air Act the Environmental Protection Agency promulgates national ambient air quality standards ("NAAQS") for air pollutants, and states must then adopt state implementation plans ('SIPs') providing for the implementation, maintenance, and enforcement of the NAAQS; such plans are then submitted to EPA for approval. *See* Clean Air Act ("CAA") § 110(a)(1), 42 U.S.C. § 7410(a)(1) (1994). Even after a SIP is approved, EPA may at a later time call for SIP revisions if the Administrator finds a SIP inadequate to attain or maintain the NAAQS, to meet the dictates of pollutant transport commissions, or "to otherwise comply with any requirement of this chapter." CAA § 110(k)(5), 42 U.S.C. § 7410(k)(5).

In October 1998 EPA issued a final rule mandating that 22 states and the District of Columbia revise their SIPs to mitigate the interstate transport of ozone.[1] See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone ("Final Rule"), 63 Fed. Reg. 57,356 (1998). The statutory hook for EPA's action was a 1990 amendment to the Clean Air Act which requires that SIPs contain "adequate provisions" prohibiting

> any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere

* Judge Williams wrote Parts I.B-C and II.B; Judge Sentelle wrote Parts I.A, II.A, II.C, and III.A; Judge Rogers wrote Parts III.B and IV.

[1] The states are Alabama, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin.

> with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard.

CAA § 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994). EPA uniformly required that each state reduce nitrogen oxides (NOx--an ozone precursor) by the amount accomplishable by what EPA dubbed "highly cost-effective controls," namely, those controls EPA found capable of removing NOX at a cost of $2000 or less per ton. Numerous petitions for review challenge various aspects of EPA's decision.

In Part I we reject the following claims: that EPA could not call for the SIP revisions without convening a transport commission; that EPA failed to undertake a sufficiently state-specific determination of ozone contribution; that EPA unlawfully overrode past precedent regarding "significant" contribution; that EPA's consideration of the cost of NOx reduction violated the statute; that EPA's scheme of uniform controls is arbitrary and capricious; that CAA § 110(a)(2)(D)(i)(I) as construed by EPA violates the nondelegation doctrine.

In Part II we hold that the record does not support including Wisconsin in the SIP call, nor does it support creating NOx budgets based on the entire emissions of Missouri or Georgia. We reject the claim that South Carolina was improperly included in the SIP call.

In Part Ill we reject the claim that EPA impermissibly intruded on the statutory rights of states to fashion their SIPs. We also reject the claim that EPA violated the Regulatory Flexibility Act.

In Part IV we reject the claim that EPA arbitrarily revised the definition of a "NOx budget unit." We reject all of the claims raised by the Council of Industrial Boilers save one: we hold that EPA failed to provide adequate notice of a change in the definition of an electric generating unit. We also hold that EPA did not provide adequate notice of a change in the control level assumed for large, stationary internal combustion engines, but we reject the claim that EPA failed to follow its own standards in defining such engines. Finally, we

uphold EPA's limits on early reduction credits, and EPA's use of a 15% multiplier for calculating emissions from low mass emission units.

We note at the outset that one challenge has been stayed. In 1979, EPA set the acceptable level for ozone in the ambient air at 0.12 parts per million ("ppm"), averaged over intervals of one hour. This standard is commonly known as the "1-hour standard." By 1997, EPA had concluded that the 1-hour standard no longer adequately protected public health. See National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997). Pursuant to the agency's statutory mandate to review and revise NAAQS as appropriate, 42 U.S.C. § 7409(d)(1), EPA promulgated a new, more stringent "8-hour standard" which limits ozone levels to 0.08 ppm, averaged over an 8-hour period. See 62 Fed. Reg. 38,856 (codified at 40 C.F.R. § 50.10).

EPA has undertaken the phasing out of the 1-hour standard on an area-by-area basis, mandating that the standard would no longer apply to an area once it is "determine[d] that the area has air quality meeting the 1-hour standard." 40 C.F.R. § 50.9(b). The call for SIP revisions in question here requires the covered upwind states to submit SIP revisions pursuant to the 8-hour standard even though EPA was not designating any 8-hour nonattainment areas prior to July 1999. See 63 Fed. Reg. at 57,370; Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 6103, 112 Stat. 107, 465 (1998) (providing that states submit suggested designations no later than July 1999 and EPA finalize those designations no later than July 2000). EPA maintains that it has the authority to include the 8-hour standard in the current § 110(a)(2)(D)-specific SIP call pursuant to its authority under § 110(a)(1). Section 110(a)(1) provides that

> [e]ach State shall ... adopt and submit to [EPA], within 3 years (or such shorter period as [EPA] may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) . . ., a plan which provides for implementation, maintenance, and

> enforcement of such primary standard in each air quality control region (or portion thereof) within such State.

42 U.S.C. § 7410(a)(1).

State and Industry/Labor petitioners initially attacked the challenged SIP call on the basis that EPA exceeded its statutory authority and acted arbitrarily in basing the SIP call on the 8-hour standard when the agency had not yet designated any areas as being in nonattainment under the new standard. After petitioners' final briefs were submitted, we held in *American Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027, reh'g granted in part, den'd in part 195 F.3d 4 (D.C. Cir. 1999), that the new NAAQS based on the 8-hour standard was derived from a construction of the Clean Air Act that rendered the relevant provision an unconstitutional delegation of legislative power and remanded the case to the agency. See id. at 1033-40. Seizing on this holding, petitioners added in their reply briefs that if this court does not accept the contention in their original briefs as to why EPA impermissibly relied on the 8-hour standard, then we should hold that American Trucking means that EPA cannot rely on the 8-hour standard because it was promulgated in violation of the non-delegation doctrine.

Regardless, EPA moved to stay consideration of the issues involving the 8-hour standard because the agency has stayed the 8-hour findings contained in the challenged SIP call. granted the motion. Because EPA's stay removes the 8-hour findings as a basis for the SIP call, we will resolve only the issues involving the 1-hour standard.

I. General Claims

A. Transport Commission

States have the primary responsibility to attain and maintain NAAQS within their borders. *See* CAA § 107(a), 42 U.S.C. § 7407(a). When EPA concludes that an "implementation plan for any area is substantially inadequate to attain or maintain the relevant [NAAQS], to mitigate adequately the interstate pollutant transport described in section [176A] or

[184], or to otherwise comply with any requirement of this chapter," the CAA requires EPA to order a state to revise and correct its SIP "as necessary" ("SIP call"). CAA § 110(k)(5), 42 U.S.C. § 7410(k)(5). One such "requirement of this chapter," is the "good neighbor provision" of section 110(a)(2)(D). As amended, section 110(a)(2)(D) requires that a SIP "contain adequate provisions"

> (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard . . . [and]
>
> (ii) insuring compliance with the applicable requirements of sections [126] and [115] . . . (relating to interstate and international pollution abatement).

42 U.S.C. § 7410(a)(2)(D) (emphasis added). Section 126(b) enables an individual state or a political subdivision of a state to petition EPA to make a "finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of [§ 110(a)(2)(D)(ii)]." 42 U.S.C. § 7426(b). EPA may make or deny such a finding. See id. Section 115 pertains to petitions made by foreign countries. See 42 U.S.C. § 7415. Title I, the subchapter referenced in section 110(a)(2)(D), also includes sections 176A and 184, the provisions referenced in section 110(k)(5). In 1990, Congress added a provision to section 176A stating that EPA "may" establish an interstate air pollution transport region whenever EPA "has reason to believe that the interstate transport of air pollutants from one or more States contributes significantly to a violation of a national ambient air quality standard in one or more other States." 42 U.S.C. § 7506a(a). The section also provides that whenever EPA "establishes a transport region [EPA] shall establish a transport commission." 42 U.S.C. § 7506a(b)(1). Among other things, a section 176A commission is to assess

the interstate transport situation in the relevant transport region, assess interstate pollution mitigation strategies, and recommend to EPA measures necessary "to ensure that the plans for the relevant States meet the requirements of [section 110(a)(2)(D)]." 42 U.S.C. § 7506a(b)(2). In addition, section 176A permits a transport commission to request that EPA "issue a finding under [section 110(k)(5)] . . . that the implementation plan for one or more of the States in the transport region is substantially inadequate to meet [section 110(a)(2)(D) requirements]." 42 U.S.C. § 7506a(c). After public comment, EPA has the authority to approve, approve in part, or disapprove such a request. See id.

In part, section 184, an ozone-specific provision, establishes an ozone transport region in the northeast ("NOTR") and sets the deadline for convening the transport commission required as a result of NOTR's establishment. See 42 U.S.C. § 7511c(a). The section also requires that "[i]n accordance with [section 110] . . . each State included [or subsequently included] within a transport region established for ozone shall submit a State implementation plan or revision" regarding vehicle inspection programs and volatile organic compounds control technology. 42 U.S.C. § 7511c(b). In addition, section 184 contains provisions giving states within an established transport region the opportunity to use their section 176A-established transport commission to help develop additional ozone control measures. *See* 42 U.S.C. § 7511c(c).

Efforts to control states' upwind contributions to ozone pollution continued to fall short during the early 1990s. In 1995, upon the recommendation of the Environmental Council of the States, thirty-seven states and representatives from EPA, industry, and environmental groups formed a national work-group called the Ozone Transport Assessment Group ("OTAG") to study and devise solutions to the interstate ozone transport problem. *See* 62 Fed. Reg. 60,318, at 60,319; EPA, Ozone Transport Assessment Group Executive Report, EPA Document No. A p 95-56, Doc. No. 1I-G-05 ("Executive Report") at ii. More specifically, OTAG's purpose was to "identify and recommend a strategy to reduce transported ozone and its precursors, which, in combination with other measures will enable attainment and maintenance

of the Ozone standard in the OTAG region." Executive Report at ii. OTAG concluded that upwind states needed to reduce NOx emissions in order to address the transport problem. However, the OTAG members could not agree on specific control measure recommendations. *See* 62 Fed. Reg. at 60,320. In response to OTAG's efforts, EPA engaged in further analysis and devised the SIP call challenged here.

Industry/Labor petitioners argue that the CAA required EPA to convene a transport commission pursuant to sections 176A/184 prior to issuing the challenged sip call. EPA concedes that OTAG was not a statutorily-mandated 176A/184 transport commission as defined in the CAA. If a transport commission is required, EPA would be bound by statute to follow certain procedures in establishing and executing its commission obligation. However, we hold that the CAA does not require EPA to establish such a commission.

Industry/Labor petitioners contend that the reference to the transport commission provisions in section 110(k)(5) and the mandate of section 110(a)(2)(D) that SIP requirements be consistent with Title I provisions obligated EPA, prior to issuing the SIP call, to create a transport commission guided by the terms in sections 176A and 184 of the statute. Industry/Labor petitioners also note that sections 176A and 184 reference both sections 110(a)(2)(D) and 110(k)(5) See 42 U.S.C. §§ 7S06a(b)(2)(c), 7511c(c)(5). From this hodgepodge of largely unrelated cross-references Industry/Labor petitioners argue that EPA can only issue a section 110(k)(5) SIP call to enforce section 110(a)(2)(D)'s requirement after forming a 176A/184 transport commission we disagree.

As a threshold matter, subsections 176A(a) and (b)(1) make clear that EPA must establish a transport commission if the agency exercises its discretion to create a transport region pursuant to section 176A(a). *See* 42 U.S.C. §§ 7506a(a), (b)(1). However, EPA can address interstate transport apart from convening a 176A/184 transport commission as subsection (a) provides that EPA "may" establish a transport region and subsection (b)(1) only requires a transport commission upon the establishment of a transport region because "[w]henever the Administrator establishes a transport

region under subsection (a) . . ., the Administrator shall establish a transport commission." Moreover, the relevant section 184 requirements apply to states within established transport regions. *See* 42 U.S.C. § 7511c(a)-(c). Thus, Industry/Labor petitioners cannot reason around the determinative statutory language contained in section 176A. Statutory construction is not an exercise in picking apart a complex statute and piecing the parts back together in a manner to effect a particular end. Ideally, a statute's directive concerning a certain issue will be plain and clear. Just so here.

B. State-Specific Analysis

Section 110(a)(2)(D)(I)(i) requires that the relevant offending emissions be "emissions activity within the State." Several petitioners charge that EPA did not sufficiently analyze each particular state in determining which states contributed unduly to ozone downwind.

In issuing its Notice of Proposed Rulemaking ("NPRM"), EPA relied on data collected from OTAG. The data were multi-state and regional in nature and were framed as a model of how ozone was transported downwind from 12 different regions that covered the eastern half of the United States. See Final Rule, 63 Fed. Reg. at 57,382. The OTAG regions do not track state boundaries, so several states are split between regions. EPA also relied upon the NOx emissions of the individual states. *See id.* at 57,383-84. A potential shortcoming of the NPRM's approach was that it was too multi-state in nature. EPA knew how much NOx each state was emitting, but a state's emissions as a share of total emissions do not necessarily correspond proportionately to its share in the creation of ozone in downwind states. OTAG's multi-state modeling of such downwind transportation painted with a rather broad brush.

We need not pass judgment on whether the evidence and approach of the NPRM would have supported the final rule. After receiving comments regarding the insufficiently state- specific analysis of the NPRM, EPA performed state-specific modeling. *Id.* at 57,384. According to EPA, this confirmed the results of the regional modeling. *Id.*

The two types of state-specific modeling go by the names UAM-V and CAMx. In the UAM-V approach, the researchers model an affected downwind area to establish a base case, and then "zero-out" a particular source state. Thus with UAM-V it can be estimated what ozone concentrations would be like if a particular state contributed no ozone or ozone precursors. The CAMx modeling, on the other hand, is a source apportionment analysis which tracks modeled ozone from its precursors (NOx and volatile organic compounds (VOCs)) through the formation of ozone and subsequent migration. Whereas UAM-V tells modelers how much ozone is missing when one state is zeroed out, CAMx models an ozone concentration and provides apportionment, i.e., who sent what. An advantage of the CAMx model used by EPA was that, unlike the UAM-V modeling, with CAMx EPA could isolate man-made emissions, or ozone creation based on reactions between man-made and biogenic emissions. UAM-V modeling was less discriminating.

Petitioners really do nothing more than quibble with the state-specific modeling. For example, Industry/Labor petitioners argue that zero-out modeling is inappropriate because it models an impossible scenario--the elimination of all man-made NOx emissions; but they do not suggest how much this characteristic is likely to distort the results. State petitioners charge that sometimes the results of the two models were inconsistent, with, for example, the CAMx showing a larger migration of ozone from a state than the UAM-V showed for all man-made NOx in that state. EPA itself noted this infrequent inconsistency. *See id.* at 57,385. Neither criticism affords ground for non-expert judges to find a material likelihood of serious error. *See Appalachian Power Co. v. PA*, 135 F.3d 791, 802 (D.C. Cir. 1998).

Petitioners complain that EPA did not provide the data sooner. EPA made the new modeling available on the Internet six weeks prior to the final rule, published its availability in the Federal Register a month before the final rule, and during that time received and responded to questions and comments regarding the modeling. Other than what we have already mentioned, petitioners have evidently not been able to identify further flaws in the modeling used, and thus have failed to show any prejudice from EPA's timetable.

Personal Watercraft Indus. Ass'n v. Department of Commerce, 48 F.3d 540, 544 (D.C. Cir. 1995).

C. Determining "Significant" Contribution

Section 110(a)(2)(D)(i)(I) applies only to states that "contribute significantly" to nonattainment in a downwind state. Petitioners make essentially four arguments challenging EPA's determination of "significance": (1) EPA acted contrary to precedent; (2) EPA considered forbidden factors, namely, costs of reduction; (3) EPA irrationally imposed uniform NOx controls on the states; (4) EPA's determination was so devoid of intelligible principles as to violate the nondelegation doctrine.

1. Past Precedent

Before the 1990 amendments to the Clean Air Act, § 110(a)(2)(E)(I) directed the EPA to insist on SIP provisions adequate to prevent sources within a state from emitting air pollution that would "prevent attainment or maintenance [of primary or secondary standards] by any other State." 42 U.S.C. § 7410(a)(2)(E) (1982) (emphasis added). In a number of decisions EPA found, with approval of the courts, that various emissions of a particular state, having a proportionate impact on some downwind state greater than the impacts involved here, did not meet that standard. *See New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988); *Air Pollution Control Dist. of Jefferson County v. EPA*, 739 F.2d 1071 (6th Cir. 1984); *New York v. EPA*, 716 F.2d 440 (7th Cir. 1983); *New York v. EPA*, 710 F.2d 1200 (6th Cir. 1983); *Connecticut v. EPA*, 696 F.2d 147 (2d Cir. 1982). According to the states, these decisions, and what they claim to be Congress's implicit endorsement in the 1990 amendments, bar EPA from regarding the ozone emissions here as "significant" within the meaning of § 110(a)(2)(D)(i)(I) Thus the states would equate the old standard--"prevent attainment"--with the new standard: "contribute significantly to nonattainment"

Nothing in the text of the new section or any other provision of the statute spells out a criterion for classifying "emissions activity" as "significant." Nor did EPA, under the then-existing provision, bind itself to any criterion. Further,

given EPA's finding as to the cumulative effects of the pollutants that generate ozone, EPA might well be able to distinguish this case from the sulfur dioxide cases that the states have cited. *See* 63 Fed. Reg. at 57,359 ("The chemical reactions that create ozone take place while the pollutants are being blown through the air by the wind, which means that ozone can be more severe many miles away from the source of emissions than it is at the source."). But the states point to nothing suggesting any prior adoption by EPA of any binding concept of how much was too much, so the claim falls short at the threshold.

2. Consideration of costs

Petitioners claim § 110(a)(2)(D)(i)(I) does not permit EPA to take into consideration the cost of reducing ozone. The full section provides that SIPs must contain provisions adequately prohibiting any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard.

42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added).

Before reviewing the petitioners' attacks we must first describe how EPA went about the business at hand. It first determined that 23 jurisdictions are "significant" contributors to downwind nonattainment. 63 Fed. Reg. 57,398. In making this listing EPA drew lines based on the magnitude, frequency, and relative amount of each state's ozone contribution to a nonattainment area. For example, in one calculation it looked at the number of NOx parts per billion ("ppb") that a candidate state's emissions made to exceedances in specific downwind locations (examined as a proportion of those exceedances). Indiana was found to contribute at least 2 ppb to 4% of the 1-hour ozone exceedances in New York City, and was deemed a "significant contributor" to nonattainment there. On the other hand, Alabama, Georgia, Massachusetts, Missouri, South Carolina, Tennessee, and Wisconsin were not deemed "significant contributors" to New York City nonattainment because none of these states ever contributed more

than 2 ppb to a 1-hour exceedance in that area. Although EPA looked at other measures, e.g., the percentage contribution of a state's emissions to total concentrations in a specified area, no one quarrels either with its use of multiple measures, or with the way it drew the line at this stage.

Although the dividing line was a very low threshold of contribution, in the end EPA's rule called for termination of only a subset of each state's contribution. EPA decided that the 23 "significant contributors" need only reduce their ozone by the amount achievable with "highly cost-effective controls." 63 Fed. Reg. at 57,403. Thus, once a state had been nominally marked a "significant contributor," it could satisfy the statute, i.e., reduce its contribution to a point where it would not be "significant" within the meaning of § 110(a)(2)(D)(i)(I), by cuffing back the amount that could be eliminated with "highly cost-effective controls." EPA's design was to have a lot of states make what it considered modest NOx reductions, uniformly limited to ones that could be achieved (in EPA's estimate) for less than $2000 a ton. As a result, naturally, the ultimate line of "significance," whether measured in volume of NOx emitted or arriving in nonattainment areas, would vary from state to state depending on variations in cutback costs.

State and Industry/Labor petitioners argue that this approach runs afoul of § 110(a)(2)(D), which they read as prohibiting any consideration of costs or cost-effectiveness in determining what contributions are "significant." So far as appears, none of the states proposes that EPA, if reversed, must require complete extirpation of their NOx emissions. Rather, the gamble--at least of the small contributors--is evidently that if EPA were barred from considering costs, it would never have included such states. Because the attacks from the states and Industry/Labor are somewhat dissimilar and have shifted back-and-forth between the opening briefs, reply briefs, and oral argument, a summary of the relevant differences and vacillations is in order. We note that no party makes any claim that EPA was either confined to adopting rules whose benefits exceeded their costs, or permitted to use

that criterion in selecting its final rule.[2] Nor has it been argued that the term "significant" required consideration of costs.

State petitioners initially argued that it was "arbitrary and unlawful" for EPA to make cost effectiveness a "controlling factor" or "linchpin" in the determination of significant contribution under § 110(a)(2)(D). Thus EPA's error, as the states would have it, was in considering costs too much: "Petitioning States do not claim that there is no role for cost considerations; Petitioning States simply stress that EPA must establish a definition of significance that is dominated by air quality factors, as air quality is the sole factor mentioned in the statute." Reply Br. of Petitioning States at 4. In support of this position, State petitioners cited our en banc decision in *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc), where we held that a statutory mandate for EPA to set a standard with an "ample margin of safety to protect the public health" did not preclude the consideration of costs and technological feasibility, but that these concerns could not be the "primary consideration."

At oral argument, counsel for the states abandoned this position and decided that the statute flatly prohibits EPA from considering costs at all. Transcript of Oral Argument at 14-17. Indeed, counsel eventually went so far as to claim that if faced with two states, one of which could eliminate all relevant emissions at a trivial cost, while the other could eliminate none at a cost of less than $5000 a ton, EPA must mandate the same cutback for each. *Id.* at 16-17.

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[2] Indeed, accepting EPA's belief that ozone cannot be held responsible for mortality effects, see Proposed Rule, 62 Fed. Reg. at 60,321 (not listing death as a health effect of groundlevel ozone); compare Final Rule, 63 Fed. Reg. at 57,359 (listing "[p]ossible long-term damage to the lungs or even premature death" as health effects), and mainly using EPA data, some outside observers have calculated the benefit per ton of NOx reduction as ranging from a high of $750 per ton (for mobile sources in certain areas) to a low of negative $6 per ton (for other mobile sources). Alan Krupnick & Virginia McConnell, "Cost-Effective NOx control in the Eastern U.S." (Draft July 1999) (Table 4); see Krupnick & Anderson, A Dilemma Downwind, 137 Resources for the Future 5, 7 (1999) ("If one assumes that ozone does not cause deaths, the EPA's proposal is much too restrictive, incurring costs far out of proportion with the benefits it would bring.").

We should note here that the consequence of this position is not so extreme as it sounds. EPA's rule allows ton-for-ton emissions trading between firms based on allowances determined by each state. *See* 63 Fed. Reg. 57,456. Obviously the firms with the highest emission reduction costs will, if permitted by their states, buy up pollution allowances from firms that are granted allowances because they have over-controlled for NOx--firms, obviously, with low reduction costs. If transaction costs were zero, the only effect of the initial assignment of cutbacks would be distributional: firms would make only the cheaper cutbacks, but firms with high emission-reduction costs would buy allowances from those with low costs and thereby transfer wealth to them. See Ronald H. Coase, The Problem of Social Cost, 3 J. L. & Econ. 1 (1960). But transaction costs notoriously are not zero;[3] so the likely effect of the proposed statutory interpretation would be that any aggregate cutback would be achieved at considerably higher cost than under EPA's reading of § 110(a)(2)(D)(i)(I), with absolutely no offsetting environmental benefit to the public. Of course we are able to assume the existence of EPA's allowance trading program only because no one has challenged its adoption. As the program seems to have no rationale other than cost reduction, *see* 63 Fed. Reg. at 57,457, it would presumably be invalid under petitioners proposed reading of § 110(a)(2)(D)(i)(I), in which case the states' position really is as extreme as it sounds.

Returning to the positions of the parties, we find Industry/Labor engaging in a migration comparable to that of the states, though in the opposite direction. In its opening and reply brief Industry/Labor argued that "§ 110(a)(2)(D) requires consideration of only air quality impacts in determining the significance of any contribution." However, at oral argument Industry/Labor offered a construction of the statute that seemed to restore to EPA via § 110(k)(5) what it would take away via § 110(a)(2)(D). Industry/Labor claimed that costs could be considered when EPA determines if a SIP is "adequate" under § 110(k)(5). Transcript of Oral Argument at 28. The states actually offered this same reading of § 110(k)(5) in their reply brief (back when they thought EPA could consider costs) but appeared to abandon it at oral

[3] A glance at EPA's regulations for allowance trading will convince any doubter that transaction costs can safely be expected to be substantial. *See* 63 Fed. Reg. at 57,457-75.

argument in favor of a flat prohibition on EPA cost considerations. The argument that costs may be considered under § 110(k)(5) seems to concede that the structure of the statutory scheme manifests no intention to bar the consideration of costs.

And so we are indeed presented with the question whether § 110(a)(2)(D) bars consideration of costs, but it is presented to us with the caveat that costs can be considered later on in the process, and accompanied by a false start by the states, who initially said that EPA could consider costs, just not too much. Against this backdrop, it would be at the very least ironic for us to say there is "clear congressional intent to preclude consideration of cost" under § 110(a)(2)(D). *See Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc).

For convenience we repeat the statutory language. Section 110(a)(2)(D)(i)(I) provides that SIPs must contain provisions adequately prohibiting

> any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard.

42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). By its terms the statute is focused on "amounts" of "emissions activity" that "contribute significantly to nonattainment." The fundamental dispute is over the clarity of the phrase "contribute significantly." Must EPA simply pick some flat "amount" of contribution, based exclusively on health concerns, such that any excess would put a state in the forbidden zone of "significance"?[4] Or was it permissible for EPA to consider differences in cutback costs, so that, after reduction

[4] We deal below with a related question: Did EPA act irrationally in setting the level of significance without regard for varying levels of downwind impact? See part I.C.3 below.

of all that could be cost-effectively eliminated, any remaining "contribution" would not be considered "significant"? In deciding on the permissible ceiling, EPA used "significant" in the second way.

The term "significant" does not in itself convey a thought that significance should be measured in only one dimension-- here, in the petitioners' view, health alone. Indeed, "significant" is a very odd choice to express unidimensionality; consider the phrase "significant other." In some contexts, "significant" begs a consideration of costs. In finding a threshold requirement of "significant risk" in § 3(8) of the Occupational Health and Safety Act, 29 U.S.C. § 652(8), a plurality of the Supreme Court understood a "significant" risk as something more than a "mathematical straitjacket," and held that "[s]ome risks are plainly acceptable and others are plainly unacceptable." *Industrial Union Dept., AFL-CIO v. American Petroleum Institute ("Benzene")*, 448 U.S. 607, 655 (1980) (plurality opinion). The plurality withheld judgment on whether the Act required a "reasonable correlation between costs and benefits," id. at 615, but the upshot of inserting the adjective "significant" was a consideration of which risks are worth the cost of elimination. OSHA has since interpreted § 3(8) and regulation of "significant risk" to require "cost-effective protective measures" and set standards with an eye toward "the costs of safety standards [being] reasonably related to their benefits." *See International Union v. OSHA (Lockout/Tagout II)*, 37 F.3d 665, 668- 69 (D.C. Cir. 1994) (quoting OSHA's final rule). OSHA's reaction to the term "significant" seems to confirm what some commentators have asked rhetorically: "[C]an an agency sensibly decide whether a risk is 'significant' without also examining the cost of eliminating it?" Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein & Matthew L. Spitzer, Administrative Law and Regulatory Policy 65 (4th ed. 1999).

Petitioners conspicuously fail to describe the intellectual process by which EPA would determine "significance" if it may consider only health. EPA has determined that ozone has some adverse health effects-- however slight--at every level. *See National Ambient Air Quality Standards for Ozone*, 62 Fed. Reg. 38,856 (1997). Without consideration of cost it is hard to see why any ozone-creating

emissions should not be regarded as fatally "significant" under § 110(a)(2)(D)(i)(I). Perhaps EPA might (under such a rule) let the upwind states off at the stringency level of the programs imposed on non-attainment areas, but petitioners do not explain how "significance" can exclude cost but admit equity.

Although the ambiguity of the word "significant" and the implications of a health-only reading are potentially fatal flaws in petitioners' theory (aside from their own inability to discern the "plain language" consistently), the most formidable obstacle is the settled law of this circuit. It is only where there is "clear congressional intent to preclude consideration of cost" that we find agencies barred from considering costs. *NRDC*, 824 F.2d at 1163; *see also George E. Warren Corp. v. EPA*, 159 F.3d 616, 622-24 (D.C. Cir. 1998), *reh'g granted*, 164 F.3d 676 (D.C. Cir. 1999); *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998), *cert. denied*, 119 5. Ct. 2046 (1999); *NRDC v. EPA*, 937 F.2d 641, 643-46 (D.C. Cir. 1991); *cf. International Bhd. of Teamsters v. United States*, 735 F.2d 1525, 1528-29 (D.C. Cir. 1984) (construing mandate to adopt "reasonable requirements" for safety as allowing consideration of cost).

In NRDC we considered § 112 of the Clean Air Act, requiring EPA to set an air quality standard for hazardous pollutants with an "ample margin of safety" to protect the public health. We held that this phrase did not preclude a consideration of costs. 824 F.2d at 1155, 1163. In George E. Warren Corp. we acknowledged that the statutory scheme for the reformulated gasoline program had the "overall goal" of improving air quality and "reducing air pollution." 159 F.3d at 622. But because there was nothing "in the text or structure of the statute to indicate that the Congress intended to preclude the EPA from considering the effects a proposed rule might have upon the price and supply of gasoline," *id.* at 623, we found no such preclusion even though the provision at issue contained no allusion whatever to such effects. Similarly, in Grand Canyon Air Tour the statute required the FAA to devise a plan for "substantial restoration of the natural quiet" in the Grand Canyon area, but we found nothing impermissible in the FAA's consideration of costs to the air tourism industry in deciding how "substantial" that restoration must be. 154

F.3d at 475. In *NRDC v. EPA* we considered whether EPA permissibly used cost-benefit analysis in refusing to classify a particular polluting source as "major." The petitioners argued that cost considerations were precluded, and we stated: "[While the statutory language and legislative history do not bar petitioners' construction, they provide little support and no necessity for it." 937 F.2d at 645. We affirmed EPA's use of cost-benefit analysis.

These cases are unexceptional in their general view that preclusion of cost consideration requires a rather express congressional direction. *See* Edward W. Warren & Gary E. Marchant, "More Good Than Harm": A First Principle for Environmental Agencies and Reviewing Courts, 20 Ecology L.Q. 379, 421 (1993) ("The need to compare benefits and costs has long played a role in judicial review of agency actions regulating health and safety risks."); Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 487 (1989) (suggesting an "interpretive principle" drawn from case law, including *NRDC v. EPA*, 824 F.2d 1146, that reviewing courts will read statutes as authorizing regulations with benefits at least "roughly commensurate with their costs, unless there is a clear legislative statement to the contrary"). Three of the cases, moreover--the two NRDC cases and Grand Canyon--, involve statutory language with just the same structure as here. A mandate directed to some environmental benefit is phrased in general quantitative terms ("ample margin of safety," "substantial restoration," and "major"), and contains not a word alluding to non-health trade-offs; in each case we found that in making its judgments of degree the agency was free to consider the costs of demanding higher levels of environmental benefit. So too here.

Petitioners point to no evidence of the requisite "clear congressional intent to preclude consideration of cost." *NRDC*, 824 F.2d at 1163. The text, we have already seen, works no such preclusion. As for the statutory structure, petitioners willingly concede that costs may be considered under 110(k)(5) in determining the adequacy of a state plan. Why would a Congress intent on precluding cost considerations allow such an escape hatch? The petitioners cite no legislative history suggesting that cost considerations should be barred.

In sum, there is nothing in the text, structure, or history of § 110(a)(2)(D) that bars EPA from considering cost in its application.

3. Uniform Controls

As we have seen, EPA required that all of the covered jurisdictions, regardless of amount of contribution, reduce their NOx by an amount achievable with "highly cost-effective controls." Petitioners claim that EPA's uniform control strategy is irrational in two distinct ways. First, they observe that where two states differ considerably in the amount of their respective NOx contributions to downwind nonattainment, under the EPA rule even the small contributors must make reductions equivalent to those achievable by highly cost-effective measures. This of course flows ineluctably from the EPA's decision to draw the "significant contribution" line on a basis of cost differentials. Our upholding of that decision logically entails upholding this consequence.

The second objection is that because of distance and the vagaries of pollutant migration and ozone formation, a molecule of NOx emitted in Indiana (for example) may cause far less adverse health impact than a molecule emitted in eastern Pennsylvania. EPA acknowledges that "[s]ources that are closer to the nonattainment area tend to have much larger effects on air quality than sources that are far away." 63 Fed. Reg. at 25,919. While EPA's cost-effectiveness standard and emissions trading seem to mean that EPA will secure the resulting aggregate NOx reduction at roughly the lowest possible cost, they do not necessarily mean that it will have secured the resulting aggregate health benefits at the lowest cost. Petitioners ask, in effect, why EPA did not, by one means or another (e.g., in the emissions trading system), make reductions from sources near the nonattainment areas (or otherwise more damaging, molecule for molecule) more valuable than ones from distant sources?

EPA considered this approach, modeling the efficacy of regional alternatives compared to its uniform strategy. *See* Final Rule, 63 Fed. Reg. at 57,423. Its researchers found that non-uniform regional approaches by comparison did not "provide either a significant improvement in air quality or a

substantial reduction in cost." *Id.* The complaining states offer no material critique of EPA's methodology in reaching this answer, which in fact some independent investigators have confirmed. *See* Krupnick & Anderson, A Dilemma Downwind, 137 Resources for the Future 5, 6 (1999) ("[Even with] spatial differences, when viewed across the entire study region, RFF concluded that there was no clear benefit to an exposure-based trading system, compared with simple ton- for-ton NOx trading. Public health benefits would be approximately the same, and there would be no significant difference in costs to the utilities."). We have no basis to upset EPA's judgment.

4. Nondelegation

In their opening brief and more prominently in their reply brief, state petitioners argue that EPA has not determined "significant contribution" based on any intelligible principles. Petitioners rely heavily on our decision in *American Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027, reh'g granted in part, den'd in part 195 F.3d 4 (D.C. Cir. 1999), essentially arguing that nothing about EPA's analysis explains how much of a NOx contribution was too much (i.e., worthy of a SIP call).

We must recognize here that EPA's cost-effectiveness criterion is a radically incomplete line-drawing device. EPA has effectively ruled that each affected state must get down to the NOx emissions levels that would prevail if it removed all NOx emissions costing $2000/ton or less to remove. This satisfies its "cost-effectiveness" criterion because (if states also seek to minimize costs subject to the EPA's constraint) only these relatively low-cost tons will be removed. But while EPA indicates that it rested the $2000/ton figure on "NOx emissions controls that are available and of comparable cost to other recently undertaken or planned NOx measures," Final Rule, 63 Fed. Reg. at 57,400, it neither rests that benchmark on anything in the language or function of § 110(a)(2)(D)(i)(I), nor otherwise explains why the resulting cut-off point represents the right degree of "cost-effectiveness" (i.e., why "highly cost-effective" should be at that "height"). Accordingly, we must read EPA as having understood that its selection of the cut-off point was essentially unbounded.

But petitioners have ignored a limit to the nondelegation doctrine that we relied on in American Trucking and even more emphatically in its immediate precursor, *International Union, UAW v. OSHA ("Lockout/Tagout I")*, 938 F.2d 1310 (D.C. Cir. 1991). There we noted that the scope of the agency's "claimed power to roam" was "immense, encompassing all American enterprise." *Id.* at 1317 Quoting verbatim from *Synar v. United States*, 626 F. Supp. 1374, 1383 (D.D.C. 1986) (three-judge panel), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986), we said, "When the scope increases to immense proportions, as in [*A.L.A. Schecter Poultry Corp. v United States*, 295 U.S. 495 (1935)], the standards must be correspondingly more precise." *Lockout/Tagout I*, 938 F.2d at 1317. We noted that a mass of cases in courts had upheld delegations of effectively standardless discretion, and distinguished them precisely on the ground of the narrower scope within which the agencies could deploy that discretion. *Id. American Trucking*, perhaps too succinctly for petitioners to notice, incorporated the Lockout/Tagout I discussion of the point. *American Trucking*, 175 F.3d at 1037.

Nominally, of course, § 110(a)(2)(D)(i)(I) encompasses "all American enterprise." But as a practical matter EPA must make a number of threshold determinations that in practice appear to have confined the statute to a modest role. Before assessing "significance," EPA must find (1) emissions activity within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment. We do not mean to minimize the scope of EPA's action in the present case. Nearly half of the nation is affected and control costs will be substantial. And it may ultimately prove that the dam constituted by these criteria will burst, subjecting "all American industry" to EPA's § 110(a)(2)(D)(i)(I) discretion. But in practice, so far, these threshold criteria appear to have so limited EPA's activity under the section as to make the rule in question here the sole example of 110(a)(2)(D)(i)(I) rulemaking. Accordingly, the grounds on which we remanded in *Lockout-Tagout I* and *American Trucking* for confining agency constructions are absent here.

II. Inclusion of Specific States

A. Wisconsin

Wisconsin industry petitioners separately challenge Wisconsin's inclusion in the SIP call. The Wisconsin petitioners argue that the emissions from the state do not contribute significantly to nonattainment in any other state. Section 110(a)(2)(D)(i)(I) requires that a state "contribute significantly to nonattainment in . . . any other State" in order to be included in the challenged SIP call. 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). As explained below, EPA erroneously included Wisconsin in the SIP call because EPA failed to explain how Wisconsin contributes to nonattainment in any other state.

EPA contends that Wisconsin contributes significantly to other states' nonattainment because the state significantly contributes ozone over the Lake Michigan region. Despite EPA's Lake Michigan concerns, the agency does not show on the record that Wisconsin's ozone contribution affects any onshore state nonattainment. At oral argument, counsel for EPA conceded that "[t]he part that's missing [from the record] is a thorough explanation to support our modeling data and things of that nature between the Lake Michigan receptor area and the onshore states." Oral Arg. Tr. at 107. When asked for more, counsel could only respond that "the best evidence . . . is simply the narrative statements in the [final rule's] preambles . . . . There's nothing else there." Id. Because EPA conceded at oral argument that it has no record evidence directly linking Wisconsin's ozone contribution over Lake Michigan to nonattainment in any state and because EPA must "demonstrate[] a reasonable connection between the facts on the record and its decision" made pursuant to its statutory authority, *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995), we hold that EPA acted unlawfully by including Wisconsin in a SIP call limited by statute to states contributing significantly to nonattainment in any other state and therefore set aside Wisconsin's inclusion in the SIP call. *See* 5 U.S.C. § 706(2)(A), (C)(1994) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not accordance with law [or] in excess of statutory

jurisdiction, authority, or limitations, or short of statutory right.").

B. Missouri and Georgia

Missouri and Georgia were on the geographical perimeter of EPA's SIP call. No state west of Missouri was included, nor were the two states directly to its north (Iowa and Minnesota) and south (Arkansas). Georgia was a bit more in the thick of things, surrounded on three sides by included states--Alabama, Tennessee, North Carolina, and South Carolina; but the southern portion of Georgia borders the excluded state of Florida. Industrial petitioners within Missouri and Georgia challenge EPA's decision to calculate NOx budgets for these two states based on the entirety of NOx emissions in each state. Petitioners argue that there is record support only for the proposition that emissions from, roughly speaking, the eastern half of Missouri and the northern two-thirds of Georgia "contribute" to downwind concentrations; accordingly, they say, the NOx budgets for Missouri and Georgia should be based solely on those emissions.

We must here explain how EPA calculated NOx budgets. It projected the total amount of NOx emissions that sources in a state would emit in the year 2007, in light of expected growth and other controls required by the CAA. EPA then projected total NOx emissions if "highly cost-effective controls" were implemented. The resulting calculation became the state's NOx budget, with the difference between the base case and the controlled case being the "significant" contribution discussed above. Obviously a state's NOx budget will vary depending on whether EPA considers all of the NOx emissions in the state, or instead considers only emissions located in a smaller portion of the state (assuming emissions are dispersed throughout the state, which is the case here and without which the issue would be immaterial, as nonexistent emissions need not be controlled). For Missouri and Georgia, as for all other included states, NOx budgets were calculated using all NOx emissions in the state.

The challenge basically stems from the character of OTAG's modeling, and its resulting recommendations to EPA. OTAG's ozone transport model used grids drawn across most

of the eastern half of the United States. The first grid was the most precise, with grid cells of 12 kilometers squared (244 square kilometers)--the "fine grid." A second grid extended beyond the perimeter of the fine grid and had cells of 36 kilometers squared resolution--the "coarse grid." For a variety of reasons to be discussed shortly, the fine grid did not track state boundaries, and Missouri and Georgia were among several states that were split between the fine and coarse grids. OTAG then ran modeling for both grids, but in the final analysis did not find emissions from the coarse grid worthy of special concern. OTAG's executive summary stated: "[The focus on ozone air quality impacts in the fine grid raised questions about the need for controls in the coarse grid. The recommendations adopted by the Policy Group recognize that the OTAG analyses demonstrated that transport impacts of the coarse grid areas on the fine grid are minimal and therefore, do not include the coarse grid areas for recommended control measures other than those that would be applied nationally." Petitioners argue that EPA should base NOx budgets for Missouri and Georgia only on portions of these states within the fine grid.

EPA offers three reasons for including the entire states of Missouri and Georgia:

> (1) The division of individual States by OTAG was based, in part, on computational limitations in OTAG's modeling analyses; (2) the additional upwind emissions from full, as opposed to partial, States would provide additional benefit to downwind nonattainment areas; and, (3) Statewide emissions budgets create fewer administrative difficulties than a partial-State budget.

Final Rule, 63 Fed. Reg. at 57,424. We review deferentially, searching for the reasonableness of EPA's action, *Appalachian Power*, 135 F.3d at 802, whether that be EPA's interpretation of the statute, *see Chevron*, 467 U.S. at 842-43, or EPA's explanation for its policy choice, *see Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The two inquiries can and do overlap. *See Animal Legal Defense Fund v. Glickman*, No. 97-5009, slip op. at 9 (D.C. Cir. Feb. 1, 2000).

On its face the statute neither mandates nor prohibits an all-or-nothing statewide perspective. It directs EPA to make sure that SIPs (which of course are state plans) adequately prohibit "any source or other type of emissions activity within the State from emitting" in excess of the substantive limit. The critical issue is whether the targeted "source" or "emissions activity" "contribute[s] significantly to nonattainment" in another state.

EPA's first argument is that the fine grid split Missouri and Georgia in part because of computer limitations--every extension of the fine grid modeling was costly in terms of both computer memory and data collection. Document No. II-A-14, Draft OTAG Final Report Regional and Urban Scale Modeling--Chapter 2, 2-7 (undated). But the OTAG modelers allocated their scarce resources purposefully, by reference to known air quality data, explicitly taking into consideration the "locale of various problem areas (as represented by urban-area modeling domains), and emissions density." Id. Thus it was no mere techno-fortuity that the fine grid included enough of Missouri to include the city of St. Louis and enough of Georgia to include Atlanta: both cities are designated nonattainment areas for ozone under the 1-hour NAAQS. *See* Final Rule, 63 Fed. Reg. at 57,359. Moreover, the fine grid portions of both states are the closest to other nonattainment areas, such as Chicago and Birmingham, and generally higher ozone density.

Of course the fine grid modeling of parts of Missouri and Georgia showed emissions in the aggregate meeting the EPA's threshold "contribution" criteria. Thus fine grid modeling of each in its entirety would presumably also have done so. But that is a simple arithmetic necessity (a state is necessarily composed of its parts) and provides no reason for EPA to ignore the very air quality factors that influenced the design of the modeling that did occur. OTAG itself clearly did not think those factors magically lost their force, for it recommended against controlling the rump areas. And EPA itself acknowledged part of the reason this should be so when it observed, "Sources that are closer to the nonattainment area

tend to have much larger effects on air quality than sources that are far away." 63 Fed. Reg. at 25,919. Indeed, even if the line between areas for which there was evidence and ones for which there was none were explained solely by fortuity, EPA would still be required to act upon the evidence that was generated. *See Chemical Manufacturers Ass'n v. EPA*, 859 F.2d 977, 989 (D.C. Cir. 1988) (holding that EPA must consider "all the evidence–including the industry evidence").

This leads us to EPA defenses other than modeling design. The first is that "the larger the geographic area that is controlled, the greater the downwind benefits." Final Rule, 63 Fed. Reg. at 57,424. This reason can only stand if the emissions at issue contribute significantly to nonattainment in another state. OTAG concluded they did not. *Id.* EPA claims that its state-specific modeling, which supplemented OTAG's more regional modeling, supports including the coarse grid areas. *See id.* Yet EPA's explanation and technique make clear that emissions from the fine grid areas may have been the sole source of the finding. Indeed, EPA says as much: "[I]f emissions from part of a State contribute significantly to downwind nonattainment or maintenance problems, emissions from the entire State contribute significantly to downwind nonattainment or maintenance problems." *Id.* This of course is also true as a matter of logic (a state is the sum of its parts). But it is completely consistent with the rump portion being innocent of downwind effect, and thus is scarcely a reason for ruling that significant contributions from a border city should rope in the entire state.

Aware of this problem, EPA simply throws the burden of persuasion onto the states. "[T]here is no peculiar meteorological phenomenon that would indicate that emissions from some portion of [each of the affected states] would not impact downwind nonattainment or maintenance problems." *Id.* In addition, "the atmosphere is constantly in motion and has no limitations at geo-political boundaries." *Id.* If this is "evidence" of contribution, it proves too much. If the simple proposition that the prevailing westerlies carry pollutants eastward were enough, EPA could, on the basis of a plant in Pennsylvania, use § 110(a)(2)(D)(i)(I) to control all NOx emissions east of the Rocky Mountains. While we uphold EPA's determination that a "significant" contribution is a cost-

effectively controllable contribution, EPA must first establish that there is a measurable contribution. Interstate contributions cannot be assumed out of thin air.

In the end administrative convenience is EPA's only real defense for basing NOx budgets on the entirety of a state's emissions. There seem to be two species of this argument. First, EPA seems to claim that it is just easier to calculate a NOx budget based on all the emissions in the state instead of only a portion of such emissions. EPA provides no explanation of why this is so, and it seems dubious. Within a state are counties, air quality control regions, and for some unfortunate states, nonattainment areas. EPA also has emissions data on specific sources, some of which may be susceptible of "highly cost-effective controls," and others of which may not be. *See, e.g.*, Emissions Data For Power Plants, <www.epa.gov/acidrain/ emissions> (visited January 26, 2000). Without data from such state subdivisions and specific sources, EPA could never have performed modeling or even set a statewide budget. EPA has not explained how calculation of a budget for sources in only half of the state would be any more onerous than for all sources in the state. Unless it is relying on data that exist only for the state as a whole, calculation seems on its face easier for a half than for a whole.

EPA offers a second administrative problem. If the concern for not allowing § 110(a)(2)(D)(i)(I) to encompass unproven areas compels an insistence on proof of contribution from ever smaller geographic subdivisions, any area's specific contribution may appear insubstantial, even though collectively there are significant contributions. In other words, unlike bologna, which remains bologna no matter how thin you slice it, significant contribution may disappear if emissions activity is sliced too thinly.

While this argument was stressed on appeal, it is nowhere to be found in the proposed or final rule, except insofar as it may have lurked behind the vague invocation of "administrative difficulties." *See* Final Rule, 63 Fed. Reg. at 57,424; Proposed Rule, 62 Fed. Reg. at 60,342. As a result it is quite undeveloped. But it appears to be based on a distortion of the claims of Missouri and Georgia. They are not asserting a right to bologna tactics, to slice down the unit of measurement

to a point of insignificance. All they are claiming is that where the data--calculated under EPA's supervision--inculpate part of a state and not another, EPA should honor the resulting findings.

Such a proposition would of course leave EPA free to select states as the unit of measurement. In turn, states (or the areas of states that believed themselves innocent of material contributions, or sources located therein), might respond by offering finer-grained computations. Such a process seems more like a healthy search for truth than the collapse into infinite regress that EPA claims to fear.

EPA also points to state flexibility: "Since each State has the flexibility to determine which sources to control in order to meet the budget, a State can structure its control strategy to require fewer reductions in certain portions of the State and greater controls in other areas." Final Rule, 63 Fed. Reg. at 57,424. This theory presents at least two difficulties. First, it overlooks the fact that state budgets not only encompass the whole state but are calculated on the basis of hypothesized cutbacks from areas that have not been shown to have made significant contributions. Thus the "flexibility" comes at the cost of a burden that is heavier in the aggregate, where the added weight accomplishes no purpose relevant to § 110(a)(2)(D)(i)(I). Second, a state's use of flexibility to pursue a purely in-state set of tradeoffs between cost and benefit (and thus unrelated to the goals of § 110(a)(2)(D)(i)(I)) may actually diminish the cutbacks in areas that are making a contribution to other states' nonattainment

Thus nowhere has EPA reasonably explained why NOx budgets based on every state source are the best stopping point with respect to states on the perimeter of the ozone problem.

Therefore we vacate EPA's final rule with respect to Missouri and Georgia and remand to the agency for reconsideration in light of this opinion.

C. South Carolina

Petitioner Santee Cooper challenges South Carolina's

inclusion in the SIP call by alleging that the state's downwind ozone nonattainment impact is "minuscule" and therefore not significant. We will hold unlawful EPA's decision to include South Carolina in the SIP call if we find EPA's decision "arbitrary, capricious, an abuse of discretion, or otherwise not accordance with law." 5 U.S.C. § 706(2)(A). In order for EPA's decision to include South Carolina in the SIP call to survive review, the agency must "demonstrate[ ] a reasonable connection between the facts on the record and its decision,"

Ethyl Corp., 51 F.3d at 1064. We conclude that the record supports EPA's decision to include the state as a significant contributor to downwind nonattainment. *See* Proposed Rule, 62 Fed. Reg. at 60,337-339. EPA considered the analyses submitted by the objecting petitioner but disagreed with the petitioner's conclusions as drawn from the relevant information. Specifically, EPA conducted additional modeling and interpreted the data in context and found that South Carolina significantly contributed to ozone nonattainment. *See id.*; Final Rule, 63 Fed. Reg. at 57,394-396.

For example, under the 1-hour standard, the UAM-V zero- out modeling results indicated that South Carolina had a high maximum contribution (16 ppb) and a high frequency of contribution (at least 2 ppb to 15% of the exceedances and at least 10 ppb to 5% of the exceedances) to Atlanta. *See* Office of Air and Radiation, U.S. Environmental Protection Agency, Doc. No. VI-B-11, Air Quality Modeling Technical Support Document for the NOx SIP Call C-5, H-2 (1998). The CAMx modeling results were comparable (25 ppb maximum contribution and a frequency of at least 2 ppb to 30% of the exceedances). See id. at C-5, G-6. Among the upwind states, only Alabama had a higher maximum contribution. See id. at Apps. G & H. Moreover, South Carolina's contribution to 1-hour nonattainment in Atlanta was no more "insignificant" than many of the other linkages that were found to be significant (e.g., Indiana's contribution to New York City). *See id.* at C-13, H-16.

In contrast, the petitioner seeks to show that the data, when viewed in isolation, makes South Carolina's contribution appear insignificant. In the end, we reject the challenge made on behalf of South Carolina because the petitioner attacks, not

so much the accuracy of EPA's data, but rather EPA's reasonable analysis and application of the data.

III. Federalism and Regulatory Flexibility Act

A. NOx Budgets

Building on OTAG's work, EPA ordered the challenged SIP call under the authority of section 110(k)(5) in order to address significant contribution to 1-hour ozone nonattainment as described under section 110(a)(2)(D).[3] In fashioning the SIP call, EPA focused on OTAG's determination that "[r]egional NOx emissions reductions are effective in producing ozone benefits." Proposed Rule, 62 Fed. Reg. 60,318, at 60,320. EPA also took into consideration OTAG's conclusion that while NOx controls are effective in addressing regional ozone problems, VOC controls are most effective locally and are most advantageous to urban nonattainment areas. See id. Because OTAG concluded that NOx reductions provide the key to addressing regional ozone problems, EPA's SIP call addresses regional ozone nonattainment through NOx emissions "budgets" established by the agency for each covered state. The budgets represent the amount of allowable NOx emissions remaining after a covered state prohibits the NOx amount contributing significantly to downwind nonattainment. *See* Final Rule, 63 Fed. Reg. 57,356, at 57,368. While EPA calculated the budgets using highly cost-effective emission controls, the agency allows the states to choose the control measures necessary to bring their emissions within the budget requirements. *See id.* at 57,377; *id.* at 57,400. Under EPA's budget plan, a state "may choose from a broader menu of cost-effective, reasonable alternatives" including alternatives that "may even be more advantageous in light of local concerns." *Id.* at 57,369-370. In fact, EPA has stated that the states have "full discretion in selecting the controls, so that [the states] may choose any set of controls that would assure achievement of the budget." *Id.* at 57,378. In addition, each state has the option of adopting an interstate trading program that allows it to purchase NOx "allowances" from sources that have elected to over-control. *Id.* at 57,430. The SIP call

[3] As noted above, we will not address the 8-hour portion of the SIP call.

also gives the states the option in some circumstances to use "banked" allowances (i.e. allowances from prior years) to comply with emissions limits. *See id.*

Petitioners assert that EPA's NOx budget program impermissibly intrudes on the statutory right of the states to fashion their SIP submissions in the first instance. In support of this position, the petitioners primarily rely on our decision in *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir.), modified on other grounds, 116 F.3d 499 (D.C. Cir. 1997), where we held that EPA may not use a section 110(k)(5) SIP call to order states to adopt a particular approach to achieving the SIP requirements listed in section 110. Under the rule at issue in Virginia, EPA required states to adopt California's vehicle emission program and in effect set the numerical emissions limitations and mandated the means for the states to achieve the necessary emissions reductions. That case involved an EPA rule that required several states to reduce ozone precursors by a particular program and only allowed states to implement a more stringent program as an alternative or substitute. We held that EPA's approach exceeded its authority under section 110 because each state retains the authority to determine in the first instance the necessary and appropriate control measures needed to satisfy section 110's standards. *See id.* at 1407-09 (citing *Train v. NRDC*, 421 U.S. 60, 78-79 (1975)).

Our holding in Virginia was mandated by the Supreme Court's decision in *Train v. NRDC*, 421 U.S. 60 (1975). *Train* involved a challenge to Georgia's procedures for revising source-specific emission limits adopted in a SIP. *See id.* at 68-71. The *Train* Court held that states have the authority under the CAA to initially propose specific emission limitations. See id. at 79. The Court defined "emission limitations" as "regulations of the composition of substances emitted into the ambient air from such sources as power plants, service stations, and the like. They are the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards." *Id.* at 78 (emphasis added). The Court further held that EPA has only "a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations." *Id.* at 79 (emphasis added). The *Train*

decision and subsequent precedent make clear that section 110 left to the states "the power to [initially] determine which sources would be burdened by regulation and to what extent." *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) (emphasis added); *cf. Virginia*, 108 F.3d at 1399, 1401, 1408 (involving a source-specific program); *Riverside Cement Co. v. Thomas*, 843 F.2d 1246, 1247-48 (9th Cir. 1988) (citing *Train* and noting EPA's secondary role in enforcing source-by-source emissions limitations). As we elaborated in *Virginia*, "the Supreme Court decided . . . that [section 110] did not confer upon EPA the authority to condition approval of [a state's] implementation plan . . . on the state's adoption of a specific control measure." *Virginia*, 108 F.3d at 1408. For the reasons set forth below, we conclude that the NOx budgets do not fall within the realm of impermissible SIP call regulation as defined in *Virginia* and *Train*.

Given the *Train* and *Virginia* precedent, the validity of the NOx budget program underlying the SIP call depends in part on whether the program in effect constitutes an EPA-imposed control measure or emission limitation triggering the *Train-Virginia* federalism bar: in other words, on whether the program constitutes an impermissible source-specific means rather than a permissible end goal. However, the program's validity also depends on whether EPA's budgets allow the covered states real choice with regard to the control measure options available to them to meet the budget requirements.

Section 110(a)(2)(D) requires SIPs to contain adequate provisions prohibiting emissions from "any source or other type of emissions activity within the State" that "contribute significantly" to NAAQS nonattainment in another state. Here, EPA mandates that 22 states and the District of Columbia implement section 110(a)(2)(D) using its NOx budget system. In essence, the NOx budget in question is an EPA mandate prohibiting NOx emissions in the 23 jurisdictions from exceeding a tonnage specific to that jurisdiction. *See* 63 Fed. Reg. 57,356 at 57,491493 (1998). Of concern to petitioners, the budget rule prohibits states from seeking compliance, in whole or part, by controlling VOC emissions even though VOCs as well as NOx emissions contribute to ozone problems. *See, e.g., id.* at 57,359; *see also* 40 C.F.R. § 52.31(b)(7) (1998) (defining ozone precursors).

Yet, the budget plan's defining aspects do not necessarily cause the program to conflict with the limiting principles contained in *Train* and *Virginia*. Analyzing the budget rule together with the relevant precedent, we hold that based on section 110's silence, EPA reasonably interpreted section 110 as providing it with the authority to determine a state's NOx significant contribution level and agree with EPA that the NOx budget plan does no more than project whether states have reduced emissions sufficiently to mitigate interstate transport. *See* 63 Fed. Reg. at 57,368.

Under section 110, EPA must "approve a [SIP] submittal as a whole if it meets all of the applicable requirements of [the Act]." 42 U.S.C. § 7410(k)(3). While the states have considerable latitude in fashioning SIPs, the CAA "nonetheless subject[s] the States to strict minimum compliance requirements" and gives EPA the authority to determine a state's compliance with the requirements. *Union Elec. Co.*, 427 U.S. at 256-57 (referring to the requirements contained in the statute). Given EPA's authority to ensure that submitted SIPs adequately prohibit significantly contributing emissions, EPA permissibly relied on its general rulemaking authority to prospectively inform the states of EPA's significance determinations.

Moreover, EPA does not tell the states how to achieve SIP compliance. Rather, EPA looks to section 110(a)(2)(D) and merely provides the levels to be achieved by state-determined compliance mechanisms. Specifically, EPA set NOx reduction levels based, in part, on assumptions about reductions obtainable through highly cost-effective controls. *See* Final Rule, 63 Fed. Reg. at 57,426. However, EPA made clear that states do not have to adopt the control scheme that EPA assumed for budget-setting purposes. *See id.* at 57,369-370. States can choose from a myriad of reasonably cost-effective options to achieve the assigned reduction levels. *See, e.g., id.* at 57,438 (noting possibilities with regard to mobile sources); *id.* at 57,378 (noting possibilities with regard to stationary sources); *id.* at 57,416. While EPA bases the budgets here on "highly cost-effective" control measures, the states remain free to implement other "cost-effective" or "reasonably cost-effective" measures in place of the ones

identified by EPA. *See id.* at 57,378; 63 Fed. Reg. 60,318 at 60,328 (1997) (noting that "one State may choose to primarily achieve emissions reductions from stationary sources while another State may focus on emissions reductions from the mobile source sector"). More importantly, EPA went so far as to give the states "full discretion in selecting . . . controls," 63 Fed. Reg. at 57,378, thereby allowing states to attain their budgets by imposing even quite unreasonable, very cost-ineffective controls. In *Virginia*, we did not bar EPA from permitting more costly alternatives but rather alternatives states would consider "unreasonable or impracticable." Here, EPA accommodates *Virginia's* mandate by allowing reasonable control alternatives and allowing states to focus reduction efforts based on local needs or preferences. *See* 63 Fed. Reg. at 57,369; *id.* at 57,399-405; 62 Fed. Reg. at 60,328. Thus, real choice exists for the covered states.

Regarding EPA's decision not to rely on VOC reductions, EPA reasonably concluded that long-range ozone transport can only be addressed adequately through NOx reductions. Petitioners' reliance and emphasis on VOC reductions in lieu of NOx reductions ignores the scientific basis for EPA's rule. OTAG and EPA concluded that VOC controls would not effectively address interstate ozone transport. Furthermore, states can cure any NOx reduction "disbenefits" with corresponding optional VOC controls. *See* 62 Fed Reg. at 60,344-345; 63 Fed. Reg. at 57,425. Thus, the SIP call cannot be invalidated merely because EPA reasonably chose not to regulate VOCs.

In sum, we conclude that EPA's NOx budget program reasonably establishes reduction levels and leaves the control measure selection decision to the states. In addition, unlike the rule invalidated in *Virginia*, states implementing alternative control measures will not be penalized with more stringent emissions targets. Since the challenged budget program does not mandate a "specific, source-by-source emission limitation[ ]," the NOx budget plan does not run afoul of Train or Virginia.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§

601-612, as amended in 1996 by the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), Pub. L. No. 114-121, Title II, 110 Stat. 847, 857-74, §§ 201-253 (codified at 5 U.S.C. §§ 601-612 (1994 & Supp. 111996)), requires an agency, when proposing a rule for notice and comment, to prepare and make available for public comment an initial regulatory flexibility analysis . . . . [that] describe[s] the impact of the proposed rule on small entities," 5 U.S.C. § 603(a), including small businesses, small organizations, and small governmental jurisdictions. *See id.* § 601(6). In addition, when promulgating a final rule, an agency must "prepare a final regulatory flexibility analysis" that describes, among other things, "a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues," and "the steps the agency has taken to minimize the significant economic impact on small entities." *Id.* § 604(a).

However, these analyses are not required if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." *Id.* § 605(b). In the instant case, EPA certified that the proposed and final rule will not have a significant economic impact on a substantial number of small entities and, accordingly, did not perform any regulatory flexibility analysis. *See* Final Rule, 63 Fed. Reg. at 57,478; Proposed Rule, 62 Fed. Reg. at 60,375. RFA petitioners contend that EPA's certification was improper and in violation of the RFA. We disagree.

The court has consistently held that the RFA imposes "no obligation to conduct a small entity impact analysis of effects on entities which it does not regulate." *Motor & Equip. Mfrs. Ass'n. v. Nichols*, 142 F.3d 449, 467 (D.C. Cir. 1998) (quoting *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996)); *see also American Trucking*, 175 F.3d at 1044. Therefore, the key issue in evaluating EPA's § 605(b) certification is whether the NOx SIP call "regulates" small entities.

EPA based its certification on its view that the NOx SIP call "would not establish requirements applicable to small entities" because "it would require States to develop, adopt,

and submit SIP revisions that would achieve the necessary NOx reductions and would leave to the States the task of determining how to obtain those reductions, including which entities to regulate." Final Rule, 63 Fed. Reg. at 57,478. We agree with EPA's statement that the SIP call does not directly regulate individual sources of emissions. The instant case is thus analogous to *American Trucking*, which upheld EPA's certification under § 605(b) because the revised NAAQS at issue "regulate small entities only indirectly–that is, insofar as they affect the planning decision of the States." *American Trucking*, 175 F.3d at 1044. Therefore, we conclude that EPA's certification under § 605(b) is justified.

IV. Remaining Claims

A. Definition of "NOx Budget Unit"

RFA petitioners also contend that EPA arbitrarily revised the definition of a "NOx budget unit" to bring certain small sources within the scope of the core group of emission-producing sources to which the NOx Budget Trading Rule ("model trading rule") applies.[6] This contention is meritless.

The core group definition is used to set the minimum requirements that a State would have to include in its trading rule in order to participate in the EPA-managed multi-state trading program. *See id.* at 57,461. EPA viewed that setting such requirements was necessary for controlling the administrative costs of managing the trading program. See id.

In the proposed rule, a "NOx budget unit" was defined as a boiler that either serves electricity generators with a capacity greater than 25 megawatts ("MW") or does not serve generators but has a design heat capacity of greater than 250 million Btu/hr ("mmBTu/hr"). *See* Supplemental Notice for the Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone ("Supplemental Notice of Proposed Rule"), 63 Fed. Reg.

[6] To assist states in meeting their budgets and to facilitate the most cost-effective reductions, the SIP call established a model rule for interstate trading of NOx "allowances." Each state can choose whether to adopt the model rule, which will be administered by EPA, to adopt its own trading program, or to have no trading program at all. *See* Final Rule, 63 Fed. Reg. at 57,456-58.

25,902, 25,978 (1998). EPA sought comment on "the appropriateness of including [such] categories ..., whether the size cut-offs should be higher or lower for these source categories, and the appropriateness of including other source categories in the core group." *Id.* at 25,923. In the final rule, EPA discussed and revised the definition to expand the core group by including large boilers--those with design heat capacity of greater than 250 mmBtu/hr--even if they served generators with a capacity less than 25 MW. *See* Final Rule, 63 Fed. Reg. at 57,518. EPA explained that it was making this change in order to address the concern raised in the comments about excluding large boilers with high levels of emission just because they happen to serve small generators. *See id.* at 57,461.

EPA's revision is reasonable. The only argument that RFA petitioners seem to have against the change is that it contradicts EPA's statement elsewhere that "small electrical generators less than 25 MW . . . will be exempt under the final model rule." *Id.* at 57,463. It is unclear why this statement renders EPA's final action arbitrary. EPA's definition of a NOx budget unit and the reasons for its change are set forth in the preamble to the final rule, and the most that the RFA petitioners have demonstrated is that EPA made at least one statement that was, as EPA concedes in its brief, "incomplete in that it did not address the case of large boilers with small generators." Such a minor oversight in the drafting of the preamble to the final rule does not render the substantive decision by EPA arbitrary.

B. Council of Industrial Boiler Owners

1. Introduction

In the rulemaking, EPA distinguished between electricity generating units ("EGUs") and non-electricity generating units ("non-EGUs"). Council of Industrial Boiler Owners ("CIBO"), a trade association whose membership consists of companies and universities operating industrial boilers and turbines ("industrial boilers"), which constitute one category of non-EGUs, challenges the NOx SIP call for being based on the following arbitrary and capricious actions by EPA: EPA's failure to determine whether non-EGUs are

significant contributors, EPA's flawed cost assumptions in its determination of cost-effective control measures for non-EGUs, EPA's erroneous calculation of non-EGU budgets, and EPA's arbitrary redefinition of the term "EGU." We agree only that EPA's redefinition of EGUs was arbitrary and capricious.

2. Significant Contribution of Industrial Boilers

CIBO challenges EPA's decision to include non-EGU boilers in the rule without having isolated non-EGU emissions to determine whether they "significantly contribute" to the interstate ozone transport problem and whether implementing highly cost-effective emissions reduction measures on industrial boilers would ameliorate nonattainment in downwind states. CIBO maintains that non-EGU boilers typically have significantly shorter stacks than EGUs and that their emissions, as a result, fall below the "mixing layer" that promotes long-range NOx transport. Therefore, CIBO contends, industrial boilers as a group can have no impact on long-range ozone transport. However, this factual claim fails in view of contrary evidence in the record. OTAG's Executive Report states as one of its major conclusions that "[b]oth elevated (from tall stacks) and low-level NOx reductions are effective." Executive Report at 4. EPA reiterated this finding by OTAG in the NPRM, *see* Proposed Rule, 62 Fed. Reg. at 60,332, it relied on the finding, and it appears that members of CIBO never challenged it during the comment period. Therefore, we cannot say EPA's inclusion of non-EGUs in the group of significantly contributing sources was arbitrary.

3. Cost-Effectiveness Calculation for Industrial Boilers' Control Measures

CIBO also challenges EPA's conclusion that industrial boilers could achieve a 60% emissions reduction using highly cost-effective control measures, *see* Final Rule, 63 Fed. Reg. at 57,418, as based on flawed cost calculations. More specifically, CIBO lists the following alleged problems in EPA's cost assumptions:

-EPA's assumption of 10 years as the lifetime of all control measures for industrial boilers, except for selective

catalytic reduction and selective non-catalytic reduction controls, for which 20 years was assumed.

-EPA's use of a 10% discount rate, not 7%, in its cost-effectiveness analysis.

-EPA's failure to take into account the fact that control effectiveness can vary by as much as 10% to 20%.

-EPA's failure to take into account cost and feasibility implications of load variability and firing of multiple fuels.

-EPA's assumption of NOx emission allowance costs of $2,000 per ton, when emission allowances trade for $5,500 to $6,300 per ton.

The general problem of these criticisms is that CIBO merely lists several items as problems and labels all of them "irrational" without explaining why its claims should concern the court. Given that almost all of CIBO's challenges involve technical details on which the court generally defers to the agency's expertise, CIBO's failure to explain why the so-called problems it identifies amount to an arbitrary and capricious decisionmaking is fatal to its claims.[7] Therefore, we reject CIBO's claims regarding EPA's underlying cost assumptions about industrial boilers.

4. Determination of Non-EGU Component of State NOx Budgets

[7] For instance, the last item on the list, that it is arbitrary and capricious for EPA to assume NOx emission allowance costs of $2,000 per ton when emission allowances now trade for $5,500 to $6,300 per ton, is insufficiently explained. Of course, if the firms in the market generating entitlement prices of $5,500 to $6,300 per ton were regulated at the same degree of stringency as EPA contemplates for firms expected to be burdened under the present rule, the market price would be strong evidence that compliance would cost far more than the $2,000 per ton figure that EPA has used. No one would pay $6,000 for an entitlement to emit a ton that he could remove at a cost of $2,000; the price of an entitlement could not exceed the marginal removal cost. But if the prices to which CIBO points arose among firms more stringently regulated, there would be no such contradiction. CIBO has not even endeavored to show equivalent stringency.

CIBO contends that EPA's calculation of the non-EGU component for the State NOx budget lacks adequate support in the record and lists the following as problems:

- Non-EGU inventories had errors.

- EPA's use of Bureau of Economic Analysis growth factor to project 2007 emission levels have "inherent error."

- EPA employed "crude extrapolations" to identify large non-EGU boilers.

- The "default boiler capacity file" is not in the record and the record does not reveal how EPA manipulated the data.

- The source of Bureau of Economic Analysis growth factors is not identified in the record, and the record does not show how EPA manipulated the data.

- It is unknown whether EPA credited NOx reductions from fluidized-bed combustion technology.

Again, CIBO merely presents a list of problems without explaining why these alleged errors render EPA's rulemaking arbitrary or capricious. In addition, CIBO members had repeated opportunities to provide correct information for some of these items during the rulemaking process. CIBO's poorly articulated, blanket accusations at this late stage contribute little to improve the quality of agency rulemaking; therefore, we reject CIBO's challenges regarding EPA's calculation of NOx budgets for non-EGUs.

5. Definition of EGU

More persuasively, CIBO contends that EPA revised the definition of "EGU" without adequate notice. Throughout the rulemaking, EPA defined an EGU as it did under the acid rain program, which excludes from the category of "utility units" those cogeneration units that sell less than one-third of their potential electrical output capacity or less than 25 MW per year. *See* 42 U.S.C. § 7651a(17)(C). However, two months after the promulgation of the rule, EPA redefined an EGU as a

unit that serves a "large" generator (greater than 25MW) that sells electricity. CIBO contends that EPA did not provide sufficient notice and opportunity to comment on this revision, especially considering that the industrial boilers have relied on the previous definition for a number of years. We agree.

EPA maintains that it provided adequate notice in the May 1998 supplemental notice, stating that "deregulation of electric utilities" means that "it is not clear how ownership of the electricity generating facilities will evolve." Supplemental Notice of Proposed Rule, 63 Fed. Reg. at 25,923. Given that "there is no relevant physical or technological difference between utilities and other power generators," EPA proposed, "all large electricity generating sources, regardless of ownership," should be treated the same. *Id.* There are several problems with EPA's response. First, it is undisputed that EPA was departing from the definition of EGUs as used in prior regulatory contexts, and EPA was not explicit about the departure from the prior practice until two months after the rule was promulgated. Neither the proposed rulemaking in November 1997 nor the final rule in October 1998 introduced the new definition. EPA waited until the December 1998 correction notice to announce that it will "classify as an EGU any boiler . . . that is connected to a generator greater than 25 MWe from which any electricity is sold." Correction and Clarification to the Finding of Significant Contribution and Rulemaking for Purposes of Reducing Regional Transport of Ozone ("Correction Notice to Final Rule"), 63 Fed. Reg. 71,220, 71,223 (1998). After the December correction notice, EPA reopened the comment period for sixty days for comments on this and other issues. In EPA's May 1999 response to the comments, EPA, for the first time, discussed why the change was necessary and offered a justification largely based on recent changes in the electric power industry. See Responses to the 2007 Baseline Sub-Inventory Information and Significant Comments for the Final NOx SIP Call 10-12 (May 1999) ("Responses to Final Comments").

As to the statement in the May 1998 supplemental notice that EPA claims constitutes notice, this statement was given in EPA's discussion of how the core group of sources for the model trading rule should be defined, and not in the context of a discussion about the general distinction between

EGUs and non-EGUs for the purposes of calculating state budgets. *Cf. Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 550 (D.C. Cir. 1983). Moreover, EPA also explicitly observed in the same May notice discussion about the model trading rule that "[m]any of the definitions ... are the same as those used in . . . the Acid Rain Program regulations, in order to maintain consistency among programs." Supplemental Notice of Proposed Rule, 63 Fed. Reg. at 25,923. Given the vague and conflicting signals that EPA was sending, it is an exaggeration to state that some general "theme" of the regulatory consequences of deregulation of the utility industry throughout rulemaking meant that EPA's last- minute revision of the definition of EGU should have been anticipated by industrial boilers as a "logical outgrowth" of EPA's earlier statements. *See American Water Works Ass'n. v. EPA*, 40 F.3d 1266, 1274-75 (D.C. Cir. 1994).

EPA contends that even assuming that CIBO did not have adequate notice and opportunity to comment on the EGU definition, the error has been cured because it reopened the comment period on this issue after its announcement of the revision. *See* Correction Notice to Final Rule, 63 Fed. Reg. at 71,221-23. This response is to no avail. During the new comment period, some commenters complained that there had not been sufficient notice and opportunity to comment on the EGU redefinition. *See* Responses to Final Comment, at 12. EPA's response to this charge primarily relied on the claim that there had been adequate notice prior to the redefinition, see id., and we have already rejected that argument.

Therefore, we conclude EPA did not provide sufficient notice and opportunity to comment for its redefinition of EGUs and remand the rulemaking to EPA for further consideration in light of this opinion.

C. IINGAA

Interstate Natural Gas Association of America ("TNGAA"), a trade association that represents major interstate natural gas transmission companies in the United States, contends that EPA did not provide adequate notice and opportunity to comment on the control level assumed for "large" stationary internal combustion ("IC") engines in its

determination of state NOx budgets. We agree.

EPA's NPRM in November 1997 assumed a 70% control level for large IC engines, *see* Proposed Rule, 62 Fed. Reg. at 60,354, after considering and rejecting an 80% control level. *See id.* at 60,348. Then, in the supplemental notice in May 1998, EPA continued to assume the 70% control level. *See* Supplemental Notice of Proposed Rule, 63 Fed. Reg. at 25,908. EPA stated in the same notice that it "intends to further analyze" control approaches for IC engines and said that "[a]s the above analyses are completed, EPA intends to place them in the docket." *Id.* at 25,909. EPA did not present a new analysis until September 4, 1998, when it concluded that a 90% control level was more appropriate for large IC engines. See Technical Support Document for Stationary International Combustion Engines 2 (September 4, 1998). When the rule was finally promulgated in October 1998, EPA stated that it was assuming a 90% control level. *See* Final Rule, 63 Fed. Reg. at 57,418.

INGAA contends that EPA's switch from 70% to 90% for large IC engines was unanticipated and that EPA should have allowed comments on the issue. Considering EPA's repeated affirmation of the 70% assumption throughout rule-making and rejection of a higher, 80% assumption earlier, a revision in its assumption less than one month before the final rule was promulgated hardly provided adequate notice, especially given the magnitude of the consequences of the proposed change on the regulated bodies. Therefore, we remand for further consideration on this issue.[8]

In addition, INGAA challenges EPA's definition of large IC engines. EPA, in the final rule, distinguished between large and small sources by defining a "cutoff level." 63 Fed. Reg. at 57,414. EPA assumed no control for sources below the cutoff level and defined small sources as units with a capacity less than or equal to 250 mmBtu/hr and with emissions less than or equal to one ton per day. *See id.* at 57,415. EPA added that "EPA is relying on a capacity approach first and a tons per day approach second (where a capacity data is not

[8] INGAA further contends that, even putting aside the notice issue, the documents that EPA relies on do not support EPA's assumption of 90% control level. Because we are remanding on the basis of the conclusion that there was inadequate notice, we do not reach the merits of the issue.

available or appropriate)" to define small sources. *Id.* at 57,416. Then, in the December correction notice, EPA largely repeated the same methodology for determining the cutoff level, but added that "[a] stationary internal combustion engine and a cement plant were determined to be 'large' if its 1995 average daily ozone season emissions were greater than one ton." Correction Notice to Final Rule, 63 Fed. Reg. at 71,224.

INGAA contends that EPA did not follow its own standard in the correction notice and singled out IC engines and cement plants without explanation. Although EPA's various statements on this issue throughout rulemaking have not always been very clear or entirely consistent, EPA went through an extensive comment period on this issue, *see* Final Rule, 63 Fed. Reg. at 57,415-17, and we agree with EPA that the change that INGAA criticizes for being arbitrary is merely a minor clarification that satisfies the reasonableness standard.

D. PP&L

1. EPA's Restrictions on Early Reduction Credits

PP&L, an electric utility that owns several generating stations in Pennsylvania, contends that EPA arbitrarily limited the number of "early reduction credits" ("ERCs"). We disagree.

Under the SIP call, a source can generate ERCs if it reduces its NOx emissions before May 2003 to a level below that is required by any regulatory scheme. ERCs can then be used to compensate for emitting emissions above required levels in a later time period. *See* Final Rule, 63 Fed. Reg. at 57,430. EPA limited the amount of available ERCs for each state to the size of each state's compliance supplement pool ("CSP"). *See id.* at 57,474. The CSP is an additional allowance of emissions that allows states to emit 200,000 tons of NOx in the 2003-2004 ozone seasons over the state emissions budgets. *Id.* at 57,428. EPA created the CSP in response to the comments that if all utilities had to install pollution control equipment by May 1, 2003, there might be disruptions in

electricity supply. *See id.* If a state chooses to use the CSP, it can either provide ERCs or distribute the allowances to sources that demonstrate a need for the compliance supplement. *See id.* at 57,429-30.

PP&L contends that imposing this limit on the number of ERCs is arbitrary and capricious because placing any limit on ERCs is environmentally counterproductive. We do not find this contention persuasive. EPA noted during the comment period that ERCs, although generally beneficial, can be costly in that they allow states to exceed their budgets. *See* Responses to Significant Comments on the Proposed Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group (OTAG) Region for Purposes of Reducing Regional Transport of Ozone 346 (September 1998) ("Responses to Comments"). EPA noted further that the CSP, by establishing a cap on the number of allowances to be distributed, limited such potential costs. *Id.* EPA's decision is thus reasonable.

PP&L also contends that EPA has not demonstrated why the "flow control mechanism" is not sufficient to address its concern. Under the flow control mechanism, the use of banked allowances exceeding 10% of the emissions budget for sources in the trading program is either flatly prohibited or discouraged by discounting the value of ERCs used as such, and states can choose between either method. *See* Final Rule, 63 Fed. Reg. at 57,431-32. This complaint by PP&L overlooks the fact that EPA included the flow control mechanism in the regulatory scheme "[a]s a final safeguard limiting the impact of additional allowances eligible for banking in the system." Responses to Comments, at 346. Therefore, it was a safeguard created in addition to the CSP limitation. It was within EPA's discretion to devise multiple limitations to contain the environmental cost of ERCs.

PP&L further contends that, even if it is rational for EPA to place a limit on the amount of ERCs, EPA's choice of setting the limit at the same amount as the CSP is arbitrary and capricious. This contention fails as well. The record shows that EPA allowed ERCs merely as a mechanism for managing the CSP, not as an independent program with a purpose separate from that of the CSP. *See* Final Rule, 63 Fed. Reg. at

57,428-33. Therefore, EPA's decision to limit the amount of ERCs to the size of the CSP was reasonable.

2. Emissions Multiplier for Low Mass Emission Units

PP&L also contends that EPA arbitrarily required "low mass emission units" ("LMEUs") to use a 15% multiplier to calculate their emissions. We disagree.

EPA allows LMEUs either to use a generic default NOx or to determine a unit-specific NOx emission rate by conducting a stack test once every five years. Because EPA found that the stack test results can vary by 15% or more depending on atmospheric conditions, EPA requires an LMEU to calculate its emissions rate by adding 15% to the stack test result. *See* Final Rule, 63 Fed. Reg. at 57,490.

PP&L contends that this is unreasonable because EPA has stated that the testing would likely underestimate emissions during cooler less humid conditions. *See id.* PP&L reasons that because the SIP call applies only during summer seasons (when ozone forms), that the stack test underestimates emissions during the winter cannot justify the 15% multiplier. This contention is to no avail. Because the record contains evidence that NOx rates determined by the stack test can vary widely even during the ozone season, EPA's decision was reasonable. *See* Docket A-97-35, Item IV-A-1 at 43-54 (August 26, 1998).

Conclusion

We vacate EPA's final rule with respect to Wisconsin, Missouri, and Georgia (*see* Part II.A-B). These cases are remanded for further consideration in light of this opinion. We hold that EPA failed to provide adequate notice of a change in the definition of an electric generating unit (*see* Part IV.B.5), and that EPA did not provide adequate notice of a change in

the control level assumed for large stationary internal combustion engines (see Part IV.C). These cases are also remanded.

In all other respects, the petitions for review are denied.

So ordered.

Sentelle, Circuit Judge, dissenting: Unlike the majority's journey through this regulatory scheme, mine is neither lengthy nor complex, because I get off at the first strop. In promulgating the regulations at issue, EPA purported to exercise the authority Congress conferred upon it to enforce the requirements of 42 U.S.C. § 7410(a)(2)(D)(i)(I) which empowers the Administrator to police the contents of State Implementation Plans ("SIPs"), specifically to ensure that such plans contain

> adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard . . . .

42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994) (emphasis added). EPA is a federal agency—a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress. If there is no statute conferring authority, a federal agency has none. The only statute upon which EPA purports to rely in the current controversy is § 7410(a)(2)(D)(i)(I). That section provides authority for EPA to require States to act in a certain fashion based upon the presence of sources or activities which emit "pollutants in amounts which will . . . contribute significantly to nonattainment." It would appear to me that Congress clearly empowered EPA to base its actions on amounts of pollutants, those amounts to be measured in terms of significance of contribution to downwind nonattainment. Instead, EPA has chosen, doubtless in the pursuit of beneficent ends, to assert authority to require the SIPs to contain provisions based not on the amounts of pollutants, nor even on the relative significance of the contributions of such pollutants to downwind nonattainment, but on the relative cost effectiveness of alleviation. I agree with the State petitioners that it is undeniable that EPA has exceeded its statutory authority.

We have before had occasion to remind EPA that its mission is not a roving commission to achieve pure air or any

other laudable goal. In *American Petroleum Institute v. United States EPA*, 52 F.3d 1113 (D.C. Cir. 1995), we reviewed an EPA rule requiring that thirty percent of the oxygen in reformulated gasoline be derived from renewable sources, such as ethanol. The statutory authority under which EPA operated, 42 U.S.C. § 7545(k)(1) empowered EPA to promulgate regulations achieving "the greatest reduction in emissions of ozone forming volatile organic compounds 42 U.S.C. § 7545(k)(1). Although EPA advanced commendable goals of economic benefit for its inclusion of the additional goal of ethanol market protection, we struck down the overreaching and reminded EPA that "it is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *API*, 52 F.3d at 1119 (*quoting Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

Similarly, in *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995), we considered EPA's denial of a Clean Air Act waiver application based on health considerations. We did not suggest that EPA acted in bad faith or that health considerations were not important, but we repaired to the statutory grant of authority in 42 U.S.C. § 7545(f)(4), which based the Administrator's authority to deny waiver solely on the property of an additive to "cause or contribute to a failure of any emission control device or system 42 U.S.C. § 7545(f)(4). We again granted the petition for review of the Administration's action, reminding EPA that where "the plain language of a provision makes it clear that . . . decisions are to be based on one criterion, the EPA cannot base its decision on other criteria," even on a criterion as laudable as the health of the public. *Ethyl Corp.*, 51 F.3d at 1058.

For all the majority's discussion of inconsistent arguments by States and the possibility of taking costs into account elsewhere raised by the Administration and adopted by the majority, I do not see why the present controversy does not fall squarely within the four corners of API and Ethyl Corp.

Congress set forth one criterion: the emission of an amount of pollutant sufficient to contribute significantly to downwind nonattainment. EPA adopted a different criterion:

the cost effectiveness of alleviation. I would remind the agency once more of the lessons of API and Ethyl Corp., allow the petitions for review, and end the case.

The majority makes a fundamental mistake by divorcing the adverb "significantly" from the verb it modifies, "contribute." The majority compounds its error by divorcing significantly from the rest of the statutory provision in issue. Maj. Op. at 19-23. By focusing on "significance" or what it means to be "significant," the majority ignores the fact that the statute permits EPA to address that which is "contribut[ed] significantly." 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). And what should EPA look for as being contributed significantly? Congress clearly answered that question for the agency as being an "amount" of an "air pollutant." *Id.* Considering that Congress expressly gave EPA authority with regard to "any air pollutant in amounts which will contribute significantly to nonattainment . . .," *id.* (emphasis added), I marvel at an interpretation that permits cost effectiveness to find a place in a statutory provision addressing amounts of air pollutant contribution. While the contribution must affect nonattainment significantly, no reasonable reading of the statutory provision in its entirety allows the term significantly to springboard costs of alleviation into EPA's statutorily-defined authority. Given § 7410(a)(2)(D)(i)(I) mandate as a whole, it becomes clear that EPA and the majority have to contort the statute's language by isolating the term significantly and ignoring the terms air pollutant, amounts, and contribute in order to work cost considerations into the statute. I just cannot agree with such an unusual exercise in statutory construction. I see nothing in *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), that either compels or counsels the majority's result. EPA argues that Congress did not define significant contribution. True, it did not. Neither did it define amount. But neither EPA nor the majority have offered any reasonable interpretation of those words which makes them depend upon or even relate to the cost

effectiveness of alleviation.[1] EPA comes close to arguing: Congress has not expressly forbidden us to use this criterion, therefore we may use it. As we said in *Ethyl Corp.*:

> To suggest, as the [EPA] effectively does, that Chevron step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power . . ., is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent. 51 F.3d at 1060. Because the majority's deference to EPA's unreasonable statutory interpretation as couched in the agency s scurrilous "second-step" cost effectiveness analysis ventures off track, as I said, I am getting off at the first stop.

Because I would invalidate the regulatory scheme before us at its inception, I will not address the subsidiary issues pursued by my colleagues.

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[1]Contrary to the suggestion of the majority, neither of the cases cited by the majority bear any implication that the cost of alleviating or otherwise dealing with risk expressed as a noun or a verb has any effect upon the definition of "significant" or "significantly" used as an adjective or adverb modifying that noun or verb. The portion of *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 655 (1980) (plurality opinion) quoted by the majority to the effect "that a 'significant' risk . . . is not a mathematical straitjacket," (Maj. Op. at 20) does not deal in any fashion with the cost of alleviation. Rather, Justice Stevens in that opinion was contrasting the significance of a one-in-a-billion chance of cancer from drinking chlorinated water against the one-in-a-thousand risk that regular inhalation of certain benzene-containing vapors would be fatal. Obviously, the "significance" of the risk deals with its importance, not the cost of its alleviation. Equally off point is *International Union, United Auto Workers v. OSHA*, 37 F.3d 665, 668-69 (D.C. Cir. 1994), which concerned the cost-effectiveness of alleviating measures directed at risk theretofore determined to have been significant, not with the use of cost-effectiveness in determining the significance of the risk velnon.

APPENDIX B

[Filed June 22 2000]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1497
September Term, 1999

State of Michigan, Michigan Department of Environmental Quality and State of West Virginia, Division of Environmental Protection,
Petitioners

v.

Environmental Protection Agency,
Respondent

New England Council, Inc., et al.,
Intervenors

Consolidated with
98-1499, 98-1500, 98-1501, 98-1502, 98-1504, 98-1518, 98-1556, 98-1567, 98-1573,98-1585, 98-1588, 98-1590, 98-1596, 98-1598, 98-1601, 98-1602, 98-1608, 98-1609, 98-1611, 98-1615, 98-1616, 98-1617, 98-1618, 98-1619, 98-1621, 99-1070, 99-1093

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

The petitions for rehearing en banc of the Industry/Labor petitioners, the petitioning States, and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Deputy Clerk

Circuit Judge Sentelle would grant the petition of the Industry/Labor petitioners and Part I of the petition of the petitioning States.

Circuit Judges Tatel and Garland did not participate in this matter.

APPENDIX C

[Filed June 22, 2000]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1497
September Term, 1999

State of Michigan, Michigan Department of Environmental Quality and State of West Virginia, Division of Environmental Protection,
Petitioners

v.

Environmental Protection Agency,
Respondent

New England Council, Inc., et al.,
Intervenors

Consolidated with
98-1499, 98-1500, 98-1501, 98-1502, 98-1504, 98-1518, 98-1556, 98-1567, 98-1573,98-1585, 98-1588, 98-1590, 98-1596, 98-1598, 98-1601, 98-1602, 98-1608, 98-1609, 98-1611, 98-1615, 98-1616, 98-1617, 98-1618, 98-1619, 98-1621, 99-1070, 99-1093

BEFORE: Williams, Sentelle and Rogers, *Circuit Judges.*

ORDER

Upon consideration of the petitions for rehearing of the Industry/Labor petitioners and of the petitioning States, filed April 20, 2000, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Deputy Clerk

Circuit Judge Sentelle would grant the petition of the Industry/Labor parties and Part I of the petition of the petitioning States.

APPENDIX D

MANDATE
Issued: 9/13/00
By: /s/ E. Brown, Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

State of Michigan, Michigan Department of Environmental Quality and State of West Virginia, Division of Environmental Protection, Petitioners

v.

U.S. Environmental Protection Agency, Respondent

New England Council, Inc., et al., Intervenors

Consolidated with
98-1499, 98-1500, 98-1501, 98-1502, 98-1504, 98-1518, 98-1556, 98-1567, 98-1573,98-1585, 98-1588, 98-1590, 98-1596, 98-1598, 98-1601, 98-1602, 98-1608, 98-1609, 98-1611, 98-1615, 98-1616, 98-1617, 98-1618, 98-1619, 98-1621, 99-1070, 99-1093

Before: Williams, Sentelle and Rogers, Circuit Judges.

On Petitions for Review of an Order of the Environmental Protection Agency

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JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Environmental Protection Agency and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petitions for review in Nos. 98-1567 and 99-1093 are granted,

the petitions in Nos. 98-1609 and 98-1618 are granted in part and denied in part, and the remaining petitions are denied, all in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

Date: March 3, 2000

Opinion Per Curiam
Dissenting opinion filed by Circuit Judge Sentelle.

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court

Area Code 202
479-3011

September 8, 2000

Mr. Thomas L. Casey
Law Building, 525 West Ottawa
P.O. Box 30212
Lansing, MI 48909-0212

Re: Michigan, et al.
v. Environmental Protection Agency,
et al.
Application No. 00A215

Dear Mr. Casey:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on September 8, 2000, extended the time to and including October 20, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Jeffrey D. Atkins
Assistant Clerk

APPENDIX F

Part II

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 72, 75, and 96

[[Page 57356]]

[FRL-6171-2]
RIN 2060-AH10

Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

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b. Pollution Abatement Requirements
c. Monitoring Requirements
d. Approvability of Trading Program
3. Sanctions
4. FIPs
B. Emissions Reporting Requirements for States
1. Use of Inventory Data
2. Response to Comments
3. Final Rule
4. Data Elements to be Reported
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6. Ozone Season Reporting
7. Data Reporting Procedures
8. Confidential Data
C. Timeline
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B. NOX Budget Trading Program Rulemaking Overview
C. General Design of NOX Budget Trading Program

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2. Alternative Market Mechanisms
3. State Adoption of Model Rule
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D. Applicability
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VIII. Interaction with Title IV NOX Rule
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4. Justification for Rulemaking
X. Administrative Requirements
A. Executive Order 12866: Regulatory Impact Analysis
B. Regulatory Flexibility Act: Small Entity Impacts
C. Unfunded Mandates Reform Act
D. Paperwork Reduction Act
E. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks
1. Applicability of E.O. 13045
2. Children's Health Protection
F. Executive Order 12898: Environmental Justice
G. Executive Order 12875: Enhancing the Intergovernmental Partnerships
H. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments
I. Judicial Review
J. Congressional Review Act
K. National Technology Transfer and Advancement Act

Appendix A--Detailed Discussion of Changes to Part 75

CFR Revisions and Additions

Part 51
Sec. 51.121
Sec. 51.122
Part 72
Part 75
Part 96

I. Background
A. Summary of Rulemaking and Affected States

By notice of proposed rulemaking (NPR, proposal, or "proposed SIP call") (62 FR 60318, November 7, 1997) and by supplemental notice (SNPR or supplemental proposal) (63 FR 25902, May 11, 1998), EPA proposed to find that NOX emissions from sources and emitting activities (sources) in 23 jurisdictions (hereinafter also referred to as States) will significantly contribute to nonattainment of the 1-hour and 8-hour ozone NAAQS, or will interfere with maintenance of the 8-hour NAAQS, in one or more downwind States throughout the Eastern United States. The EPA based these proposals on data generated by OTAG, public comments, and other relevant information. Today's final action confirms that proposed finding. It also requires, under CAA section 110(a)(1) and 110(k)(5), that the 23 jurisdictions adopt and submit SIP revisions that, in order to assure that their SIPs meet the requirements of section 110(a)(2)(D)(i)(I), contain provisions adequate to prohibit sources in those States from emitting NOX in amounts that "contribute significantly to nonattainment in, or interfere with maintenance by," a downwind State. The 23 jurisdictions are: Alabama, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin.

Each of these States and the District of Columbia is required to adopt and submit by September 30, 1999, a SIP revision. The SIP revision must contain measures that will assure that sources in the State reduce their NOX emissions sufficiently to eliminate the amounts of NOX emissions that contribute significantly to nonattainment, or that interfere with maintenance, downwind. By eliminating these amounts of NOX emissions, the control measures will assure that the remaining NOX emissions will meet the level identified in today's rule as the State's NOX emissions budget. For simplicity, this final rule may refer to the amounts that such SIP provisions must prohibit in order to meet the statute as the "significant amounts" of NOX emissions. After prohibiting these significant amounts of NOX, the remaining amounts emitted by sources in the covered States will not "significantly contribute to nonattainment, or interfere with maintenance by," a downwind State, under section 110(a)(2)(D)(i)(I). Section II.C, Weight-of-Evidence Determination of Covered States,

describes how EPA determined which States include sources that emit NOX in amounts of concern (the "covered" States), and Sections II.D, Cost Effectiveness of Emissions Reductions; II.E, Comparison of Upwind and Downwind Costs; and III, Determination of Budgets, describe how EPA determined the significant amounts of emissions and the resulting statewide emissions budgets for the States identified above. Section IV, Air Quality Assessment, discusses air quality analyses conducted by EPA which help confirm the decisions and requirements set forth in this rulemaking. Section V, NOX Control Implementation and Budget Achievement Dates, primarily discusses the dates by which (1) the States must submit SIP revisions in response to today's action, (2) the sources must implement the measures the States choose for the purpose of prohibiting the significant amounts of NOX, and (3) the States are projected to achieve the budget levels. Section VI, SIP Criteria and Emissions Reporting Requirements, describes the SIP requirements themselves.

The SIP requirements permit each State to determine what measures to adopt to prohibit the significant amounts and hence meet the necessary emissions budget. Consistent with OTAG's recommendations to achieve

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NOx emissions decreases primarily from large stationary sources in a trading program, EPA encourages States to consider electric utility and large boiler controls under a cap-and-trade program as a cost-effective strategy. The recommended cap-and-trade program is described in more detail in Section VII, NOx Budget Trading Program. The EPA also recognizes that promotion of energy efficiency can contribute to a cost-effective strategy. In Section VIII, Interaction with Title IV NOx rule, EPA explains that it is not adopting proposed revisions to the title IV NOx rule concerning the relationship between this rulemaking and the title IV NOx rule. The remaining parts of today's action include Section IX, Non-Ozone Benefits of NOx Reductions, and Section X, Administrative Requirements.

The EPA also conducted a RIA which is available in the docket to this rulemaking as a technical support document (TSD), entitled "Regulatory Impact Analysis for the Regional NOx SIP Call" (docket no. VI-B-09). A detailed explanation of how EPA calculated the budgets is also available as a TSD

entitled "Development of Modeling Inventory and Budgets for the Regional NOx Call" (docket no. VI-B-10). These two TSDs have been revised for the final rulemaking. A detailed explanation of the air quality modeling analyses is also available, entitled "Air Quality Modeling Technical Support Document for the Regional NOx SIP Call" (docket no. VI-B-11) for this final rulemaking. This preamble for today's notice responds to some of the comments, but another document, entitled "Response to Significant Comments on the Finding of Significant Contribution and Rulemaking for Certain States in the OTAG Region for Purposes of Reducing Regional Transport of Ozone," is included in the docket (docket no. VI-C-01).

B. General Factual Background

In today's action, EPA takes a significant step toward reducing ozone in the eastern half of the country. Ground-level ozone, the main harmful ingredient in smog, is produced in complex chemical reactions when its precursors, volatile organic compounds (VOC) and NOx, react in the presence of sunlight. The chemical reactions that create ozone take place while the pollutants are being blown through the air by the wind, which means that ozone can be more severe many miles away from the source of emissions than it is at the source.

The science of ozone formation, transport, and accumulation is complex. Ozone is produced and destroyed in a cyclical set of chemical reactions involving NOx, VOC and sunlight. Emissions of NOx and VOC are necessary for the formation of ozone in the lower atmosphere. In part of the cycle of reactions, ozone concentrations in an area can be lowered by the reaction of nitric oxide with ozone, forming nitrogen dioxide; as the air moves downwind and the cycle continues, the nitrogen dioxide forms additional ozone. The importance of this reaction depends, in part, on the relative concentrations of NOx, VOC and ozone, all of which change with time and location.

At ground level, ozone can cause a variety of ill effects to human health, crops and trees. Specifically, ground-level ozone has been shown in clinical and/or epidemiologial studies to have the following health effects:

- Decreased lung function, primarily in children active outdoors

- Increased respiratory symptoms, particularly in highly sensitive individuals
- Hospital admissions and emergency room visits for respiratory causes among children and adults with pre-existing respiratory disease such as asthma
- Inflammation of the lung
- Possible long-term damage to the lungs or even premature death.

The new 8-hour primary ambient air quality standard (62 FR 38856, July 18, 1997) will provide increased protection to the public from these health effects.

Each year, ground-level ozone above background is also responsible for significant agricultural crop yield losses. Ozone also causes noticeable foliar damage in many crops, trees, and ornamental plants (i.e., grass, flowers, shrubs, and trees) and causes reduced growth in plants. Studies indicate that current ambient levels of ozone are responsible for damage to forests and ecosystems (including habitat for native animal species).

As part of the efforts to reduce harmful levels of smog, EPA, today, is establishing a requirement for certain States to revise their SIPs in order to implement the necessary regional-scale reductions in NOx emissions, and, thereby, reduce transported NOx and ozone. Since air pollution travels across county and State lines, it is essential for State governments and air pollution control agencies to cooperate to solve the problem.

Currently, the following areas, impacted by the 23 jurisdictions that are the subject of today's rulemaking, are designated nonattainment areas for ozone under the 1-hour NAAQS:

Atlanta, GA
Baltimore, MD
Birmingham, AL
Boston-Lawrence-Worcester (eastern MA), MA-NH
Chicago-Gary-Lake County, IL-IN
Cincinnati-Hamilton, OH-KY
Door County, WI
Greater Connecticut
Kent & Queen Anne's Counties, MD
Lancaster, PA
Louisville, KY-IN

Manitowoc County, WI
Milwaukee-Racine, WI
Muskegon, MI
New York-Northern New Jersey-Long Island, NY-NJ-CT
Philadelphia-Wilmington-Trenton, PA-NJ-DE-MD
Pittsburgh-Beaver Valley, PA
Portland, ME
Portsmouth-Dover-Rochester, NH
Providence (All RI), RI
St. Louis, MO-IL
Springfield (western MA), MA
Washington, DC-MD-VA

These areas include many of the major urban centers in the eastern half of the Nation. The combined population for these areas is approximately 61.5 million. As described elsewhere, the reductions called for in today's action will reduce ozone levels throughout these areas.

Many more areas currently violate the 8-hour NAAQS. The EPA estimates that a total population of approximately 73 million in the 23 jurisdictions live in counties for which air quality is monitored to be in violation of that NAAQS. The reductions called for in today's action will reduce ozone levels throughout these areas as well.

Moreover, as discussed below, many of these areas are expected to be classified as "transitional," which means, in most cases, that they are expected to come into attainment solely as a result of the reductions required by today's action. Thus, for those who live in these areas, the reductions required under today's action, in-and-of-themselves, are expected to mean the difference between unhealthful ozone levels and acceptable ozone levels.

Please note that EPA will not designate ozone nonattainment areas for the 8-hour NAAQS until 2000, and these designations will be based on the data that are most recently available at that time.

C. Statutory and Regulatory Background

1. CAA Provisions

a. 1970 and 1977 CAA Amendments. For almost 30 years, Congress has focused major efforts on curbing ground-level ozone. In 1970, Congress amended the CAA to require, in title I, that EPA issue, and periodically review . . .

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on ozone levels.5

\5\ Ozone Transport Ass
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In light of OTAG's work and additional information, EPA is able to assess ozone transport as it relates to the 8-hour NAAQS and to set forth requirements as necessary to address the 8-hour standard in this rulemaking. Ozone transport causes problems for downwind areas under either the 1-hour or 8-hour standard. The regional reductions of NOX that will be achieved through this SIP call for the 1-hour NAAQS are key components for meeting the new 8-hour ozone standard in a cost-effective manner. Therefore, EPA believes that the OTAG recommendations for how to address ozone transport are valid for both NAAQS.

Several commenters urged EPA to adopt and implement all Federal measures identified in the OTAG recommendations.6 The Agency is committed to continue implementing national control measures for NOX, as recommended by OTAG. In addition, EPA has adopted the following national measures for purposes of reducing VOC: architectural and industrial maintenance coatings, consumer/commercial products, and autobody refinishing. The EPA has made no decisions regarding further VOC reductions beyond the reductions specified as phase I in the OTAG recommendations.7

\6\ The OTAG recommendations are located in Appendix B of the November 7, 1997 NPR (62 FR 60376).

\7\ Letter to the Honorable Ken Calvert, Chairman, Subcommittee on Energy and Environment, U.S. House of Representatives, from Robert D. Brenner, Acting Deputy Assistant Administrator for Air and Radiation, U.S. EPA, June 26, 1998, transmitting EPA's responses to questions following the May 20, 1998 congressional hearing on EPA's proposed rule on paints and coatings.

Other more specific comments concerning the OTAG recommendations will be addressed throughout this rulemaking as the issues are discussed.

F. Discussion of Comment Period and Availability of Key Information

The EPA received numerous comments concerning the adequacy of the comment period for the November 7, 1997 NPR and May 11, 1998 SNPR. Some commenters remarked that the comment period for the NPR should be extended to

allow for development and review of technical information, including inventory data, growth factors, and the resulting budget. Commenters stated that the additional time was particularly necessary for subregional air quality modeling, which is modeling designed to isolate the impacts of emissions from a particular State or group of States on downwind areas. Many specifically requested an additional 120 days, and one requested an additional 9 months. Some commenters indicated that EPA did not incorporate their comments from the NPR into the SNPR. Other commenters insisted that key information supporting the rule is not publicly available. The EPA also received comments that additional public hearings should be held in other locations of the OTAG region.

1. Request for Extension of the Comment Period

The EPA allowed a 120-day public comment period for the November 7, 1997 NPR, which closed on March 9, 1998. By notice (63 FR 17349, April 9, 1998), EPA reopened the comment period for members of the public to submit additional modeling analyses, as well as comments concerning the implications that any additional modeling may have for the State NOx budgets under consideration in the November 7, 1997 proposal. The comment period was reopened through the end of the comment period on the SNPR. The SNPR, which was published on May 11, 1998, allowed a comment period until June 25, 1998. Thus, for most issues addressed in the NPR, including air quality modeling issues, commenters received an almost 8-month formal comment period. Indeed, many commenters had access to the NPR immediately after October 10, 1997, when it was signed and posted on an EPA website. The Agency also received a number of comments after June 25, 1998, which were also reviewed and considered in developing the final rule.

The EPA believes this additional opportunity for the public to submit comments was reasonable. After March 9, 1998--the initial date for close of the comment period on the NPR--EPA received numerous comments on various issues raised in the NPR, including air quality issues. Many of these comments were extensive, which indicates that commenters received adequate time.

With respect to the concern that EPA did not incorporate comments received on the NPR into the SNPR, it would not have been practical for EPA to incorporate

comments received on the NPR into the SNPR because the SNPR was completed soon after the close of the comment period for the NPR. In general, the SNPR addressed different aspects of the rule than the NPR, and one of the purposes of the SNPR was to take comment on several new issues, as noted above. The EPA has addressed comments on both the NPR and SNPR in today's action.

The major issues raised in the comments are responded to throughout the preamble of this final rule. A comprehensive summary of all significant comments, along with EPA's response to the comments which have not been responded to in the preamble (Response to Comments), can be found in the docket for this rulemaking (Docket No. A-96-56).

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problem that requires regional scale reductions (62 FR 60326).

Accordingly, EPA has adopted a "collective contribution" approach to determining whether sources "contribute" to nonattainment downwind: EPA determines the impact downwind of emissions in the aggregate from a particular geographic region. If the aggregated emissions are considered to contribute to nonattainment downwind, then all of the emissions in that region should be considered as contributors to that nonattainment problem. In today's action, EPA is continuing the same interpretation of the term "contribute," for the reasons just described.

(2) "Significantly". (a) Notice of Proposed Rulemaking. In the NPR, EPA proposed a "weight-of-evidence," or multi-factor, approach for determining whether a contribution is "significant."

The EPA proposed two separate interpretations for the term "contribute significantly," which had implications as to which factors were to be considered in what parts of the analysis. Under the first interpretation, significant contribution is determined with reference to--* * * factors concerning amounts of emissions and their ambient impact, including the nature of how the pollutant is formed, the level of emissions and emissions density (defined as amount of emissions per square mile) in the particular upwind area, the level of emissions in other upwind areas, the amount of contribution to ozone in the downwind area from the upwind areas, and the distance between the upwind sources and the downwind nonattainment problem. Under this approach, when emissions

and ambient impact reach a certain level, as assessed by reference to the factors identified above, those emissions would be considered to "contribute significantly" to nonattainment. (62 FR 60325).

Under this interpretation, after identifying amounts of emissions that constitute a significant contribution, EPA then determines the amount of emissions reductions necessary to adequately mitigate these contributions. This determination entails--* * * [e]valuation of the costs of available measures for reducing upwind emissions * * * as well as to the extent known (at least qualitatively), the relative costs of, amounts of reductions from, and ambient impact of measures available in the downwind areas. *Id.*

Under the second interpretation, EPA considers all of the factors under both the significant contribution prong and the mitigation prong of the first interpretation, and, once EPA determines an amount of emissions that does significantly contribute to downwind nonattainment, then EPA would determine that the SIP must contain provisions adequate to prohibit that amount of emissions. *Id.* at 60325-26.

(b) Today's Action. The EPA has determined that the second interpretation should be used; that is, that the determination of significant contribution includes both air quality factors relating to amounts of upwind emissions and their ambient impact downwind, as well as cost factors relating to the costs of the upwind emissions reductions. Once an amount of emissions is identified in an upwind State that contributes significantly to a nonattainment problem downwind, or interferes with maintenance downwind, the SIP must include provisions to eliminate that amount of emissions.

To reiterate, section 110(a)(2)(D)(i)(I) provides that the SIP must "prohibit[]" sources from "emitting any air pollutant in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other State." The term "prohibit" is defined as "to forbid by authority" or "prevent," or "preclude." "The American Heritage Dictionary of the English Language" (3d ed. 1992, 1448). The EPA believes that the term "prohibit" means that SIPs must eliminate those amounts of emissions determined to contribute significantly to nonattainment or interfere with maintenance downwind. Moreover, EPA believes that whether emissions "contribute significantly" depends on a multifactor test, as described below. Thus, section 110(a)(2)(D)(i)(I) does not require the

elimination of all upwind source emissions that impact downwind air quality problems, but only those amounts of emissions that, based on a multi-factor test, significantly contribute to downwind air quality problems.

d. Multi-factor Test for Determining Significant Contribution. In the NPR, EPA proposed a multi-factor test for determining whether emissions from an upwind State contribute significantly to a nonattainment or maintenance problem downwind. The EPA received numerous comments on the factors. Based on the comments and EPA's further analysis, EPA, in today's action, is continuing the multi-factor approach, with some refinements in response to comments, with respect to the factors EPA considered and the manner in which EPA considered them.

In determining whether emissions from upwind States affected by today's action contribute significantly to downwind nonattainment or maintenance problems, EPA specifically considered the following factors with respect to each such upwind State. These factors were the primary components in EPA's consideration.

The overall nature of the ozone problem (i.e., "collective contribution")

The extent of the downwind nonattainment problems to which the upwind State's emissions are linked, including the ambient impact of controls required under the CAA or otherwise implemented in the downwind areas

The ambient impact of the emissions from the upwind State's sources on the downwind nonattainment problems

The availability of highly cost effective control measures for upwind emissions.

The first three of these factors are related to air quality; the fourth is related to costs.

In addition, EPA generally reviewed several other considerations before concluding that upwind emissions contribute significantly to downwind nonattainment. The EPA did not consider it necessary, or did not have adequate information, to apply each of these factors with specificity with respect to each upwind State's emissions. In addition, in some instances, EPA did not have quantitative information to assess certain of these factors, and instead relied on qualitative information. These considerations were secondary aspects of EPA's analysis. They include:

The consistency of the regional reductions with the attainment needs of the downwind areas with nonattainment problems.

The overall fairness of the control regimes required of the downwind and upwind areas, including the extent of the controls required or implemented by the downwind and upwind areas.

General cost considerations, including the relative cost-effectiveness of additional downwind controls compared to upwind controls.

All of these factors and considerations are described in the following sections.

e. Air Quality Factors. As noted above, EPA specifically considered three air quality factors with respect to each upwind State, which factors, in conjunction with the cost factor discussed in the next section, were the primary components in EPA's consideration:

The overall nature of the ozone problem (i.e., "collective contribution").

The extent of the downwind nonattainment problems to which the upwind State's emissions are linked,

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including the ambient impact of controls required under the CAA or otherwise implemented in the downwind areas

• The ambient impact of the emissions from the upwind State's sources on the downwind nonattainment problems

(1) Collective Contribution. As indicated elsewhere, ozone generally results from the collective contribution of emissions from numerous sources over a large geographic area. For example, for urban nonattainment areas under the 1-hour NAAQS, the downwind sources, comprise numerous stationary sources as well as mobile on-road sources, mobile off-road sources, and consumer and commercial products. Further, additional contributions are made by numerous upwind States, both adjacent to and further away from the nonattainment area itself. The fact that virtually every nonattainment problem is caused by numerous sources over a wide geographic area is a factor suggesting that the solution to the problem is the implementation over a wide area of controls on many sources, each of which may have a small or unmeasureable ambient impact by itself.

(2) Extent of Downwind Nonattainment Problems, Including Ambient Impact of Required Controls. In determining whether a downwind area has a nonattainment problem under the 1-hour standard to which an upwind area may be determined to be a significant contributor, EPA determined whether the downwind area currently has a nonattainment problem, and whether that area area would continue to have a nonattainment problem as of the year 2007 assuming that in that area, all controls specifically required under the CAA were implemented, and all required or otherwise expected Federal measures were implemented. If, following implementation of such required CAA controls and Federal measures, the downwind area would remain in nonattainment, then EPA considered that area as having a nonattainment problem to which upwind areas may be determined to be significant contributors.

Thus, this analytical approach assumes that downwind areas implement all required controls and receive the benefit of reductions from Federal measures, and yet have a residual nonattainment problem (prior to the implementation of the regional reductions required by today's action). The fact that a nonattainment problem persists, notwithstanding fulfillment of CAA requirements by the downwind sources, is a factor suggesting that it is reasonable for the upwind sources to be part of the solution to the ongoing nonattainment problem.

The EPA undertook a comparable analysis with respect to the 8-hour NAAQS. That is, the major urban areas in the northeast, midwest, and south that are violating the 8-hour NAAQS are designated nonattainment under the 1-hour NAAQS as well. After these areas are designated nonattainment under the 8-hour NAAQS, they will become subject to the control requirements of section 172(c). However, for these areas, the section 172(c) requirements do not, by their terms, impose any specific controls other than what these areas have already implemented to fulfill the requirements under section 182 attendant to their designation and classification under the 1-hour NAAQS. Accordingly, the same air quality modeling analyses that shows residual nonattainment for at least one of the urban areas linked to each upwind State under the 1-hour standard shows residual nonattainment for those areas under the 8-hour NAAQS. Indeed, modeling analyses relied on for today's action indicate residual nonattainment for the major urban areas even after

the implementation of regional reductions comparable to those required today. [26]

\26\ The presence of residual nonattainment in major urban areas after their implementation of specifically required CAA controls supports the regional reductions required under today's action. Those regional reductions allow the major urban areas to progress towards attainment under the 8-hour NAAQS, and, at the same time, significantly ameliorate the nonattainment problems under the 8-hour NAAQS for numerous other areas. In fact, EPA projections indicate that numerous areas with nonattainment problems will achieve attainment of the 8-hour NAAQS as a result of the regional reductions.

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(3) Ambient Impact of Emissions from the Upwind Sources. In today's action, EPA examined the impact of numerous upwind States on numerous downwind areas with nonattainment problems.

Under the 1-hour NAAQS, EPA conducted various air quality modeling analyses that examined the impact of emissions from sources in each upwind State on ozone levels in downwind nonattainment areas, in light of the impact of emissions from sources in other upwind States on the downwind area's nonattainment problem. The EPA assessed the frequency and magnitude of each upwind State's contribution to downwind nonattainment problems. Some of the modeling analyses also permitted determining the magnitude of the average contribution and the peak contribution from each upwind State, as well as the percentage of each upwind State's contribution to the downwind nonattainment problem.

The EPA determined that for each upwind State affected by today's action, its contribution to a downwind nonattainment problem, in conjunction with the contribution from other upwind States, comprised a relatively large percentage of the nonattainment problem. The EPA further determined that, in this context, the impacts from each affected upwind State's NOx emissions are sufficiently large and/or frequent so that the amounts of that State's emissions should be considered to be significant contributions, depending on the cost factor and other relevant

considerations. For most upwind States, EPA conducted two types of modeling--UAM-V and CAMx--that isolated the impact of emissions from the upwind State alone on downwind nonattainment.

The EPA also conducted much the same analysis to determine the impact of emissions from each upwind State on ozone levels in downwind States under the 8-hour NAAQS. Because nonattainment problems under the 8-hour NAAQS are widespread, and because EPA has not designated individual nonattainment areas, EPA focused this part of its inquiry on the upwind State's impact on the entire downwind State.

The EPA's analysis under both the 1-hour and 8-hour NAAQS led EPA to conclude that, in light of both the collective contribution nature of the ozone problem, and the fact that downwind areas continue to suffer a nonattainment problem even after implementation of all required CAA measures and Federal measures, emissions from each of the affected upwind States have a sufficiently large and/or frequent ambient impact such that those emissions contribute significantly to nonattainment downwind, depending on the availability of highly cost-effective measures and on other considerations discussed below.

f. Determination of Highly Cost-effective Reductions and of Budgets. After determining the degree to which NOx emissions, as a whole from the particular upwind States, contribute to downwind nonattainment or maintenance problems, EPA then determined whether any amounts of the NOx emissions may be eliminated through controls that, on a cost-per-ton basis, may be considered to be highly cost effective. By examining the cost effectiveness of recently promulgated or proposed NOx controls, EPA determined that an average of approximately $2,000 per ton removed

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is highly cost effective. The EPA then determined a set of controls on NOx sources that would cost no more than an average of $2,000 per ton reduced. Specifically, EPA determined that one set of these controls would include a cap-and-trade program for (i) electricity generating boilers and turbines larger than 25 Mwe ("large EGUs"), and (ii) large non-electricity generating industrial boilers and turbines ("large non-EGU boilers and turbines"). The application of an

emission rate of 0.15 lb/mmBtu and 1995-1996 utilization for EGUs and 60 percent for large non-EGUs to the emissions projected to occur in 2007 including growth and CAA measures, led to the determination of the amounts to be reduced. The remaining amount is a State's budget.

The EPA further determined that additional highly cost-effective controls are also available for cement manufacturing sources and internal combustion engines. On the basis of reasonable assumptions concerning growth to the year 2007, EPA then determined the amounts of emissions from these source categories that would be eliminated with those controls.

The EPA further determined that there were no other controls on other NOx sources that qualify as highly cost effective (although several controls are reasonably cost-effective).

On the basis of the determinations just described for the various source categories, EPA determined an amount of NOx emissions that may be eliminated through these highly cost-effective measures. Because EPA had also determined that the NOx emissions from the affected upwind States have a large and/or frequent impact on downwind nonattainment or maintenance problems, EPA concludes that the amount of NOx emissions from those States that can be eliminated through application of highly cost-effective control measures contributes significantly to nonattainment or maintenance problems downwind.

Under section 110(a)(2)(D)(i)(I), the SIP must include "adequate provisions prohibiting" sources from emitting these 'amounts." Because no highly cost-effective controls are available to eliminate the remaining amounts of NOx emissions, EPA concludes that those emissions do not contribute significantly to downwind nonattainment or maintenance problems. As indicated below and in Section III, there are cost-effective alternatives available to States that choose not to adopt all of the highly cost-effective measures on which EPA based its selection of the significant amounts of NOx emissions.

To implement EPA's determinations, each affected upwind State is required to submit for EPA approval SIP controls projected to be sufficient, by the year 2007, to eliminate the amount of NOx emissions in the State that EPA determined contributes significantly to nonattainment. The EPA determined this amount of reductions, for each affected

upwind State, as follows: EPA first determined the amount of NOx emissions in that State by the year 2007, based on assumptions concerning both growth and emissions controls that are required under the CAA or that will be implemented due to Federal actions (the "2007 base case"). Second, EPA applied the control measures identified as highly cost effective to the 2007 base case amount for the appropriate source categories. The amount of NOx emissions remaining in the State after application of controls to the affected source categories constitutes the 2007 budget. The difference between the 2007 base case and the 2007 budget is the amount of NOx emissions in that State by the year 2007 that EPA has determined to contribute significantly to nonattainment and that, therefore, the SIPs must prohibit.

The upwind State's SIP revision due in response to today's action must provide controls that, on the basis of the same assumptions (including concerning growth) made by EPA in determining the budget, would limit NOx emissions in the year 2007 to no more than the 2007 budget. The State has full discretion in selecting the controls, so that it may choose any set of controls that would assure achievement of the budget.

As EPA stated in the NPR:

States are not constrained to adopt measures that mirror the measures EPA used in calculating the budgets. In fact, EPA believes that many control measures not on the list relied upon to develop EPA's proposed budgets are reasonable--especially those, like enhanced vehicle inspection and maintenance programs, that yield both NOx and VOC emissions reductions.[27] Thus, one State may choose to primarily achieve emissions reductions from stationary sources while another State may focus emission reductions from the mobile source sector.

\27\ As indicated in the NPR, EPA considers that measures may be reasonable in light of their reduction of VOC and NOx emissions, even though their cost-effectiveness in terms of cost per NOx emissions removed is relatively high (62 FR 60346-48).

(62 FR 60328).

The EPA believes that its overall approach derives further support from the mandate in section 110(a)(2)(D) that each SIP include provisions prohibiting "any source or other type of emissions activity within the State from emitting any air pollutant in amounts' that adversely affect downwind areas. The phrase "any source or other type of emissions activity" may be interpreted to require that the SIP regulate all sources of emissions to assure that the total amount of emissions generated within the State does not adversely affect downwind areas. By its terms, the phrase covers all emitters of any kind because every emitter--stationary, mobile, or area--may be considered a "source or other type of emissions activity." This interpretation is consistent with the legislative history of the phrase. Prior to the CAA Amendments of 1990, the predecessor to section 110(a)(2)(D), which was section 110(a)(2)(E), referred to "any stationary source within the State." In the 1990 Amendments, Congress revised the phrase to read as it currently does. A Committee Report explained, "Where prohibitions in existing section 110(a)(2)(E) apply only to emissions from a single source, the amendment includes "any other type of emissions activity," which makes the provision effective in prohibiting emissions from, for example, multiple sources, mobile sources, and area sources." V Leg. Hist. 8361, S. Rep. No. 228, 101st Cong., 1st Sess. 21 (1989).

For reasons explained below, if an upwind State chooses to achieve all or a portion of the required reductions from large EGUs or large non-EGU boilers and turbines, then the SIP must include a mass emissions limitation for those sources computed with reference to certain growth assumptions and the emission rate limits chosen by the State. The EPA recommends that this mass limitation, or cap, be accompanied by a trading program. Any such cap-and-trade program must be established by May 1, 2003. If the State chooses to achieve all or a portion of the required reductions from other sources, then the State must implement controls, by the year 2003, on those other sources that are projected to achieve the required level of reductions, based on certain assumptions (including growth), in the year 2007. The controls on these other sources may be rate-based, and no emissions cap on them is required. By the year 2007, any applicable mass emissions limitation for large EGUs or large non-EGU boilers and turbines must continue to be met, and any applicable controls on other sources must continue to be implemented. The amount of the

2007 overall budget is used to compute the level of controls that would result in the appropriate amount of emissions reductions, given assumptions concerning, for example,

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growth. To this extent, the 2007 overall budget is an important accounting tool. However, the State is not required to demonstrate that it has limited its total NOX emissions to the budget amounts. Thus, the overall budget amount is not an independently enforceable requirement.

g. Other Considerations in Determination of Significant
Contribution. The EPA reviewed several other considerations in support of its determination that the specified amounts of emissions from the affected upwind States contribute significantly to nonattainment downwind.

(1) Consistency of Regional Reductions with Downwind Attainment Needs. The EPA conducted modeling analyses of emission reductions of virtually the same magnitude as the regional reductions required under today's action. Although the impact on any downwind ozone problem of each upwind State's emissions reductions alone may be relatively small, the impact of those reductions, when combined with the reductions from the other States, is substantial. Based on this modeling, EPA determined that the regional reductions allow downwind nonattainment areas under the 1-hour NAAQS to make appreciable progress towards attainment. The EPA further determined that under the 8-hour NAAQS, many areas with nonattainment problems are expected to reach attainment based solely on the regional reductions, and that other (primarily urban) areas would benefit from the regional reductions but are expected to experience residual nonattainment. EPA further determined that none of the upwind States affected by today's action are affected by "overkill," that is, required reductions that are more than necessary to ameliorate downwind nonattainment in every downwind area affected by that upwind State.

(2) Fairness. The EPA also considered the overall fairness of the control regimes required of the downwind and upwind areas, including the extent of the controls required or implemented by the downwind and upwind areas. Most broadly, EPA believes that overall notions of fairness suggest

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designed to reduce ozone. Fu
complied with almost all of the
under the CAA, and generally a
with their remaining obligations
provisions provide assurance
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the midwest and south hav
problems and have incurred few

(3) General Cost Co
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or that in the past have had, n
the 1-hour NAAQS, or that
Transport Region (OTR), have
costs. The controls already impl
be among the less expensiv
described in more detail below
general, the next set of control
downwind nonattainment are
would cost approximately $
comparison, EPA has determin
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costs since the early 1970s.
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specific control requirements
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The CAA's sanctions and FIP
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eral downwind areas with

The EPA did not have available, and was not presented with, meaningful quantitative information indicating the cost-effectiveness of the regional reductions required today in light of their ambient impact downwind (e.g., the cost of emissions reductions per ppb improvement in ambient ozone levels in a downwind nonattainment area). This lack of information limited the extent to which EPA could rely on this consideration in making its determinations.

The various considerations just discussed point in the same direction as the other factors described above concerning air quality and costs. These factors and considerations lead EPA to conclude that the amounts of each upwind State's emissions that may be eliminated through highly cost-effective measures contribute significantly to nonattainment or maintenance problems downwind.

h. Interfere with Maintenance. Once a nonattainment area has attained the NAAQS, it is required to maintain that standard (e.g., sections 107(d)(3)(E)(iv), 110(a)(1)). Section 110(a)(2)(D)(i)(I) also requires that SIPs contain adequate provisions prohibiting amounts of emissions that "interfere with maintenance by * * * any [downwind] State." The EPA explained and applied this requirement in the NPR as follows:

This [interfere-with-maintenance] requirement * * * does not, by its terms, incorporate the qualifier of "significantly." Even so, EPA believes that for present purposes, the term "interfere" should be interpreted much the same as the term "contribute significantly," that is, through the same weight-of-evidence approach.

With respect to the 1-hour NAAQS, the "interfere-with-maintenance" prong appears to be inapplicable. The EPA hasdetermined that the 1-hour NAAQS will no longer apply to an area after EPA has determined that the area has attained that NAAQS. Under these circumstances, emissions from an upwind area cannot interfere with maintenance of the 1-hour NAAQS.

With respect to the 8-hour NAAQS, the "interfere-with-maintenance" prong remains important. After an area has reached attainment of the 8-hour NAAQS, that area is obligated to maintain that NAAQS. (See sections 110(a)(1) and 175A.) Emissions from sources in an upwind area may interfere with that maintenance.

The EPA proposes to apply much the same approach in analyzing the first component of the "interfere-with-

maintenance" issue, which is identifying the downwind areas whose maintenance of the NAAQS may suffer interference due to upwind emissions. The EPA has analyzed the "interfere-with-maintenance" issue for the 8-hour NAAQS by examining areas whose current air quality is monitored as attaining the 8-hour NAAQS [or which have no current air quality monitoring], but for which air quality modeling shows nonattainment in the year 2007. This result is projected to occur, notwithstanding the imposition of certain controls required under the CAA, because of projected increases in emissions due to growth in emissions generating activity. Under these circumstances, emissions from upwind areas may interfere with the downwind area's ability to attain. Ascertaining the impact on the downwind area's air quality of the upwind area's emissions aids in determining whether the upwind emissions interfere with maintenance . . .

* * * *

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upwind sources, and different downwind effects.

Several commenters asserted that these prior rulemakings and cases are relevant to today's action, and compel EPA to conclude that the emissions from the upwind States affected by today's action do not contribute significantly to downwind nonattainment or maintenance problems. The EPA disagrees that these earlier determinations are controlling and that these earlier determinations are inconsistent with today's action. The EPA responds to these comments in detail in the Response to Comment document.

B. Alternative Interpretation of Section 110(a)(2)(D)

As discussed above, in the NPR EPA advanced an alternative interpretation of section 110(a)(2)(D) (62 FR 60327). Under this alternative interpretation, EPA would determine the level of emissions that significantly contribute to nonattainment downwind based on factors relating to the entire amount of upwind emissions from a particular upwind State and their ambient impact downwind. The EPA would then determine what emissions reductions must be required to adequately mitigate that significant contribution based on factors relating to cost effectiveness of reductions and attainment needs downwind.

The EPA continues to believe that this alternative interpretation remains a permissible interpretation of the statute for the reasons described in the NPR (62 FR 60327). In any event, it should be noted that for purposes of today's action, EPA finds no practical difference between the requirements that would result from the interpretation of section 110(a)(2)(D) adopted today and those that would result from the alternative interpretation described in the NPR. That is, even under the alternative interpretation, today's rulemaking would contain the same findings and require the same SIP revisions as under the interpretation adopted today (62 FR 60327).

C. Weight-of-Evidence Determination of Covered States

As discussed above, EPA applied a multi-factor approach to identify the amounts of NOX emissions that contribute significantly to nonattainment. The EPA evaluated three air quality factors fo"each upwind jurisdiction (hereafter referred to as "States" or "upwind States") to determine whether each has emissions whose contributions to downwind nonattainment problems are large and/or frequent enough to be of concern. Further, for those States whose emissions are large and/or frequent enough to be of concern, EPA applied highly cost-effective controls to determine the amount of NOx in upwind States which significantly contributes to nonattainment in, or interferes with maintenance by, a downwind State. The EPA also generally reviewed several other considerations before drawing final conclusions. Even though the actual finding of significant contribution applies only to the portion of a State's emissions for which EPA has identified highly cost-effective controls, for ease of discussion, the term "significant" (or like term) is used in the discussion in this section to characterize the emissions of each upwind State that make a large and/or frequent contribution to onattainment in downwind States sufficient to warrant eliminating a portion of its emissions equivalent to what can be removed through those controls.

The purpose of this section is to describe the technical analyses performed by EPA to (a) quantify the air quality contributions from emissions in each upwind State on both 1-hour and 8-hour nonattainment, as well as 8-hour maintenance, in each downwind State, and (b) determine whether these contributions are significant.

In the proposed weight-of-evidence approach, EPA specifically applied several factors to each upwind State, as discussed in Section II.A.3.c, Definition of Significant Contribution. These factors include:

The overall nature of ozone problem (i.e., "collective contribution");

The extent of the downwind nonattainment problems to which the upwind State's emissions are linked, including the ambient impact of controls required under the CAA or otherwise implemented in the downwind areas; and

The ambient impact of the emissions from the upwind State's sources on the downwind nonattainment problems.

As part of the analysis of these factors, EPA considered the findings from OTAG's technical analyses, as well as the findings from a number of other studies performed by OTAG participants independent of OTAG. The major findings from these analyses are described below. This is followed by an overview of the approach used by EPA in the proposal for considering the above factors to identify States that make a significant contribution to downwind nonattainment. The comments and EPA's response to comments on EPA's weight-of-evidence proposal are then discussed. Following that discussion, the results of additional State-by-State UAM-V modeling and State-by-State CAMX 31 source apportionment modeling performed by EPA in response to comments are summarized.32 The EPA's analysis of the modeling results in terms of the significance of the contributions of upwind States to downwind nonattainment is presented in Section II.C.4, Confirmation of States Making a Significant Contribution to Downwind Nonattainment.

\31\ Comprehensive Air Quality Model with Extensions.
\32\ The UAM-V and CAMX models are described in the Air Quality Modeling TSD.

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1. Major Findings From OTAG-Related Technical Analyses

The major findings from the air quality and modeling analyses by OTAG and individual OTAG participants that are most relevant to today's rulemaking are as follows:

several different scales of transport (i.e., intercity, intrastate, interstate, and inter-regional) are important to the formation of high ozone in many areas of the East;

emissions reductions in a given multistate region/subregion have the most effect on ozone in that same region/subregion;

emissions reductions in a given multistate region/subregion also affect ozone in downwind multistate regions/subregions;

downwind ozone benefits decrease with distance from the source region/subregion (i.e., farther away, less effect);

downwind ozone benefits increase as the size of the upwind area being controlled increases, indicating that there is a cumulative benefit to extending controls over a larger area;

downwind ozone benefits increase as upwind emissions reductions increase (the larger the upwind reduction, the greater the downwind benefits);

a regional strategy focusing on NOX reductions across a broad portion of the region will help mitigate the ozone problem in many areas of the East;

both elevated and low-level NOX reductions decrease ozone concentrations regionwide;

there are ozone benefits across the range of controls considered by OTAG; the greatest benefits occur with the most emissions reductions; there was no ``bright line'' beyond which the benefits of emissions reductions diminish significantly;

even with the large ozone reductions that would occur if the most . . .

* * * *

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TABLE II–3.–PERCENT CONTRIBUTION FROM UPWIND STATES TO 1-HOUR NONATTAINMENT IN NEW YORK CITY

Downwind Area: New York City	Percent of total manmade emissions over 4 episodes[1]	Highest single episode percent contribution[2]
OH	4	6
VA	4	8
WV	3	7
IL	2	3
IN	1	2
KY	1	3
MI	1	4

MO	1	2
NC	1	2
TN	1	1
Total Amount from All Other States, combined	3	NA.

\1\ These values are based on CAMx Metric 3 calculated across all 4 episodes.
\2\ These values are based on CAMx Metric 3 calculated for each episode individually. These values do not add up to 100 percent.
\3\3. Total contribution from the State(s) in which the Nonattainment area is located.
\4\ 4. Not applicable.

The extent of New York City's nonattainment problem and the nature of the contributions from upwind States were considered in determining whether the values of the metrics indicate large and/or frequent contributions for individual upwind States. Specifically, additional controls beyond the local and upwind NOx reductions which are part of the regional NOx strategy may be needed to solve New York City's 1-hour nonattainment problem. Also, the total contribution from all upwind States is large and there is no single State or small number of States which comprise this total upwind portion. In this regard, the contributions to New York City from some States may not appear to be individually "high" amounts. However, (as described below) these contributions, when considered together with the contributions from other States (i.e., the collective contribution) produce a large total contribution to nonattainment in New York City.

The EPA evaluated the magnitude, frequency, and relative amount of contribution from emissions in individual upwind States to determine which States contribute significantly to 1-hour nonattainment in New York City. The UAM-V and CAMx metrics which quantify each upwind State's contribution to New York City for each of the three factors are provided in the Air Quality Modeling TSD and described below. Examination of the values for these metrics indicates that the upwind States can be divided into three general groups, based on the magnitude, frequency, and relative amount of contribution. The first group contains those upwind States for which the UAM-V and CAMx metrics all clearly indicate a significant contribution to 1-hour

nonattainment in New York City. The second group contains those States for which the CAMx and UAM-V metrics are not quite as consistent, but overall the metrics indicate a significant contribution to 1-hour nonattainment in New York City.49 The third group contains those States for which the CAMx and UAM-V metrics clearly indicate that the impacts do not make a significant contribution to New York City.

\49\ For New York City, each of the "Group 2" States were found to make a significant contribution. However, this was not the case for all of the Group 2 linkages in other nonattainment areas. For example, the contribution from Kentucky to Philadelphia and the contribution from Tennessee to Baltimore were Group 2 situations in which EPA determined that the contributions were not significant.

Group 1 Upwind States:

The CAMx and UAM-V metrics all clearly indicate that emissions from Maryland/Washington, DC/Delaware, Ohio, Pennsylvania, Virginia, and West Virginia make large and/or frequent contributions to 1-hour nonattainment in New York City. For Pennsylvania the magnitude of contribution, as indicated by the highest daily average contribution (CAMx Metric 3), is 25 ppb and the relative amount of contribution is 18 percent (CAMx Metric 4). For the other upwind areas, the magnitude of the contributions range from 9 ppb to 15 ppb (CAMx Metric 3, highest daily average contributions) with contributions in the range of 5 ppb to 10 ppb--from Ohio, Virginia, and West Virginia (UAM-V Metric 2, maximum "ppb" contribution). In terms of the frequency of the contribution, 7 percent to 11 percent of the total number of grid-hours>=125 ppb in New York City receive contributions of 10 ppb from each of these States (CAMx Metric 1 and 2). Also, the relative amounts of the contribution are in the range of 6 percent to 8 percent (CAMx Metric 4, highest single-episode average percent contribution) and the total contribution from each of three States (i.e., Ohio, Virginia, and West Virginia) is large compared to the total amount of nonattainment, ranging from 8 percent to 11 percent (UAM-V Metric 3).

Group 2 Upwind States:

The CAMx and UAM-V metrics are somewhat less consistent on the extent of contributions from each of 5 States:

Kentucky, Illinois, Indiana, Michigan, and North Carolina. None of the metrics for either model indicate extremely low or extremely high contributions. Rather, for these States most of the metrics indicate relatively high contributions while a few metrics indicate relatively low contributions. The rationale used by EPA for evaluating the contributions from these States involved comparing and contrasting each piece of data for these States on an individual "upwind State-by-upwind State" basis and as a group (i.e., for all 5 States, together) in order to weigh the relative magnitude and frequency of the contributions for making a determination of significance.

UAM-V Metrics--For each of these 5 States the "weakest" factor is the magnitude contribution (UAM-V Metric 2) in that the highest contributions are in the range of 2 to 5 ppb. The other UAM-V Metrics, however, indicate that the contributions from each State are of a larger frequency and relative amount. Specifically, four of these States (Kentucky, Indiana, Illinois, and

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Michigan) each contribute 2 to 5 ppb to as many as 3 percent to 4 percent of the exceedences in New York City (UAM-V Metrics 1 and 2). While North Carolina contributes to somewhat fewer exceedences (2 percent), this slight weakness is out-weighed by the relative amount of contribution (UAM-V Metrics 3 and 4) which indicates that the total contribution from North Carolina alone is equivalent to 3 percent of the total "ppb" >=125 ppb and 4 percent of the population-weighted "ppb" >=125 ppb in New York City. For Indiana, Illinois, and Michigan the relative amount of contribution (UAM-V Metrics 3 and 4) is also relatively high and ranges from 3 percent to 5 percent. The relative amount of contribution from Kentucky is somewhat weaker at 2 percent.

CAMx Metrics--For Illinois, all of the CAMx metrics indicate relatively large and/or frequent contributions, as described below. For Kentucky, Indiana, Michigan, and North Carolina the magnitude of contribution is large, as indicated by the maximum contribution which ranges from 6 ppb (Indiana) to 11 ppb (North Carolina). Also, the highest daily average contribution from Kentucky, Michigan, and North Carolina are all in the range of 5 ppb to 7 ppb. In terms of the frequency of contribution, Indiana and North Carolina contribute in the range of 5 ppb to 10 ppb to 3 percent and 6

percent of the exceedences, respectively, in New York City. For Kentucky, Indiana, Michigan, and North Carolina the relative amounts of contribution is somewhat mixed in that the 4-episode average percent contribution is only 1 percent, but the highest single-episode average percent contributions are higher at 2 percent from both Indiana and North Carolina, 3 percent from Kentucky, and 4 percent from Michigan (CAMx Metric 4).

Overall contributions considering UAM-V and CAMx Metrics--Considering the CAMx and UAM-V metrics, as described below, the majority of the contribution factors indicate that, overall, each of the Group 2 States contributes significantly to 1-hour nonattainment in New York City.

Kentucky--

Metrics indicating relatively high and/or frequent contributions:

--Magnitude of Contribution: the maximum contribution from CAMx is 9 ppb (CAMx Metric 2) and highest daily average contribution is 7 ppb (CAMx Metric 3);

--Frequency of Contribution: 4 percent of the exceedences receive contributions of more than 2 ppb (UAM-V Metrics 1 and 2); and

--Relative Amount of Contribution: the highest single-episode average contribution is 3 percent (CAMx Metric 4).

Metrics indicating relatively low and/or infrequent contributions:

--Magnitude of Contribution: the maximum contribution from UAM-V is 2 ppb; and

--Relative Amount of Contribution: the 4-episode average percent contribution is 1 percent (CAMx Metric 4).

Indiana--

Metrics indicating relatively high and/or frequent contributions:

--Magnitude of Contribution: the maximum "ppb" contribution is 6 ppb (CAMx Metric 2);

--Frequency of Contribution: 4 percent of the exceedences receive contributions of more than 2 ppb (UAM-V Metrics 1 and 2) ; and

--Relative Amount of Contribution: the total "ppb" contribution is equivalent to 3 percent of total amount of nonattainment (UAM-V Metric 3).

Metrics indicating relatively low and/or infrequent contributions:
--Magnitude of Contribution: the maximum contribution from is 2 ppb (UAM-V Metric 2); and
--Relative Amount of Contribution: the 4-episode average percent contribution is 1 percent (CAMx Metric 4).

Illinois--

Metrics indicating relatively high and/or frequent contributions:
--Magnitude of Contribution: the maximum contribution is 8 ppb (CAMx Metric 2); the highest daily average contribution is 6 ppb;
--Frequency of Contribution: 3 percent of the exceedences receive contributions of more than 2 ppb; and
--Relative Amount of Contribution: the highest single-episode average contribution is 3 percent (CAMx Metric 4); the total "ppb" contribution is equivalent to 3 percent of total amount of nonattainment.

Metrics indicating relatively low and/or infrequent contributions:
--Magnitude of Contribution: the maximum contribution from UAM-V is 2 ppb.

Michigan--

Metrics indicating relatively high and/or frequent contributions:
--Magnitude of Contribution: the maximum contribution is 7 ppb (CAMx Metric 2); the highest daily average contribution is 5 ppb (CAMx Metric 3);
--Frequency of Contribution: 3 percent of the exceedences receive contributions of more than 2 ppb (UAM-V Metrics 1 and 2); and
--Relative Amount of Contribution: the highest single-episode average contribution is 4 percent (CAMx Metric 4); the total "ppb" contribution is equivalent to 3 percent of the total amount of nonattainment.

Metrics indicating relatively low and/or infrequent contributions:
--Magnitude of Contribution: the maximum contribution from UAM-V is 2 ppb

--Frequency of Contribution: 1 percent of the exceedences receive contributions of 5 ppb or more (CAMx Metrics 1 and 2); and
--Relative Amount of Contribution: the 4-episode average percent contribution is 1 percent (CAMx Metric 4).

North Carolina--

Metrics indicating relatively high and/or frequent contributions:
--Magnitude of Contribution: the maximum contribution is 11 ppb (CAMx Metric 2); the highest daily average contribution is 6 ppb (CAMx Metric 3);
--Frequency of Contribution: 6 percent of exceedences receive contributions of 5 ppb or more (CAMx Metrics 1 and 2); and
--Relative Amount of Contribution: the total "ppb" contribution is equivalent to 3 percent of total amount of nonattainment.

Metrics indicating relatively low and/or infrequent contributions:
--Relative Amount of Contribution: the 4-episode average percent contribution is 1 percent (CAMx Metric 4).

Group 3 Upwind States: The CAMx and UAM-V metrics clearly indicate that the emissions from the following States do not make large and/or frequent contributions to 1-hour nonattainment in New York City:
Alabama, Georgia, Massachusetts, Missouri, South Carolina, Tennessee, and Wisconsin. The rationale for this conclusion is as follows:
--Magnitude of Contribution: all of these upwind States individually contribute less than 2 ppb to 1-hour daily maximum exceedences in New York City (UAM-V Metric 2); the highest daily average contribution was 1 ppb or less from Alabama, Georgia, and Massachusetts, and 2

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ppb from South Carolina, Tennessee, and Wisconsin (CAMx Metric 3); and
--Relative Amount of Contribution: the 4-episode average contributions from Alabama, Georgia, Massachusetts, South Carolina, and Wisconsin are less than 1 percent (CAMx Metric 4); the total contributions from Missouri and Tennessee are each equivalent to 1 percent of the total amount of nonattainment in New York City (UAM-V Metric 3).

Based on the preceding evaluation, EPA believes that emissions in each of the following twelve jurisdictions contribute significantly to 1-hour nonattainment in the New York City nonattainment area: the District of Columbia, Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, North Carolina, Ohio, Pennsylvania, Virginia, and West Virginia.

b. States Which Contain Sources That Significantly Contribute to Downwind Nonattainment. The results of EPA's assessment of the State-by-State UAM-V and CAMx modeling confirms the findings based on subregional modeling that the 23 jurisdictions contribute large and/or frequent amounts to downwind nonattainment under both the 1-hour and 8-hour NAAQS and forms an independent basis for those findings. The specific upwind States which significantly contribute to nonattainment in specific downwind States are listed in Tables II-4 and II-5 for the 1-hour NAAQS and Table II-6 and Table II-7 for the 8-hour NAAQS. The information on the 1-hour contribution linkages are presented by upwind State in Table II-4 and by downwind State in Table II-5. In Table II-4 the upwind States are each listed in the first column and the downwind States to which each upwind State contributes significantly are listed in the second column. In Table II-5, the same information is presented by downwind State. In this table, each downwind State is listed in the first column and the upwind States that contribute to that downwind State are listed in the second column. The 8-hour contribution linkages are presented by upwind State in Table II-6 and by downwind State in Table II-7.

Table II-4.--Downwind States for Which Upwind States Contain Sources That Contribute Significantly to 1-Hr Nonattainment \1\

Upwind state	Downwind states
Alabama	GA, IL*, IN*, MI*, TN, WI*.
Connecticut	ME, MA, NH.
Delaware	CT, ME, MA, NH*, NJ, NY, PA, RI, VA
District of Columbia	CT, ME, MA, NH*, NJ, NY, PA, RI, VA
Georgia	AL, TN.
Illinois	CT*, IN, MD, NJ*, NY, MI, MO, WI*.

Indiana	CT*, DE*, DC*, IL*, KY, MD, NJ*, NY, MI,OH, VA*, WI*.
Kentucky	AL, CT*, DC*, GA, IL*, IN, MD, MI*, NJ, NY, MO, OH, VA, WI*.
Maryland	CT, ME, MA, NH*, NJ, NY, PA, RI, VA
Massachusetts	ME, NH.
Michigan	CT, DC*, MD, NJ, NY, VA*.
Missouri	IL, IN, MI, WI*.
New Jersey	CT, ME, MA, NH, NY, PA, RI.
New York	CT, ME, MA, NH, NJ, RI.
North Carolina	CT*, DC*, GA, KY, MD, NJ, NY, OH, PA, VA*.
Ohio	CT, DE, DC*, KY, MD, MA, NH*, NJ, NY, PA, RI, VA.
Pennsylvania	CT, DE, DC, ME, MD, MA, NH, NJ, NY, RI, VA.
Rhode Island	ME, MA, NH.
South Carolina	AL, GA, TN.
Tennessee	AL, GA, IL*, IN, KY, MI*, OH, WI*.
Virginia	CT, DE, DC, KY*, MD, MA, NH*, NJ, NY, PA, RI.
West Virginia	CT, DE, DC, MD, MA, NJ, NY, PA, RI, VA.
Wisconsin	IL*, IN*, MI* .

\1\ States marked with an asterisk (*) are included because they are part of an interstate nonattainment area that receives a contribution from the upwind State. New Hampshire is included because it is part of the combined Boston/Portsmouth area; Connecticut and New Jersey are included because they are part of the New York City area; Kentucky is included because it is part of the Cincinnati area; Delaware is included because it is part of the Philadelphia area; Illinois is included because it is part of the St. Louis area; Illinois, Indiana, Michigan, and Wisconsin are included because they are part of the Lake Michigan area; and Maryland, Virginia, and the District of Columbia are included because they are part of the Washington, DC area.

Table II-5.--Upwind States that Contain Sources that Contribute Significantly to 1-Hr Nonattainment in Downwind States\1\

Downwind state	Upwind states
Alabama	GA, KY, SC, TN.
Connecticut	DE, DC, IL*, IN*, KY*, MD, MI*, NJ, NY, NC*, OH, PA, VA, WV.
Delaware	IN*, OH, PA, VA, WV.
District of Columbia	IN*, KY*, MI*, NC*, OH*, PA, VA, WV.
Georgia	AL, KY, NC, SC, TN.
Illinois	AL*, IN*, KY*, MO, TN*, WI*.
Indiana	AL*, IL, KY, MO, TN, WI*.
Kentucky	IN, NC, OH, TN, VA*.
Maine	CT, DE, DC, MD, MA, NJ, NY, PA, RI.
Maryland	IL, IN, KY, MI, NC, OH, PA, VA, WV.
Massachusetts	CT, DE, DC, MD, NJ, NY, OH, PA, RI, VA, WV.
Michigan	AL*, IL, IN, KY*, MO, TN*, WI*.
Missouri	IL, KY.

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Nos. 00-632 and 00-633

In The Supreme Court of the United States

Supreme Court, U.S.
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STATE OF MICHIGAN, *et al.*,
Petitioners,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

STATES OF OHIO AND INDIANA,
Petitioners,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF RESPONDENTS COUNCIL OF INDUSTRIAL BOILER OWNERS, WEST VIRGINIA MANUFACTURERS ASSOCIATION. MICHIGAN MANUFACTURERS ASSOCIATION AND VIRGINIA MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITION

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Nos. 00-632 and 00-633

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BRIEF OF RESPONDENTS COUNCIL OF INDUSTRIAL BOILER OWNERS, WEST VIRGINIA MANUFACTURERS ASSOCIATION, MICHIGAN MANUFACTURERS ASSOCIATION AND VIRGINIA MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITION

DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29.6, parties joining this brief have no parent corporations nor are owned by 10% or more by a publicly held company.

STATEMENT

Respondents Council of Industrial Boiler Owners ("CIBO"), West Virginia Manufacturers Association ("WVMA"), Michigan Manufacturers Association ("MMA"), and Virginia Manufacturers Association (" VMA") support the petition of the States of Michigan, West Virginia, South

Carolina, Alabama and the Commonwealth of Virginia (No. 00-662) and the petition of the States of Ohio and Indiana (No. 00-663) for a writ of certiorari to review the ruling of the United States Court of Appeals for the District of Columbia Circuit in *Michigan v. United States Environmental Protection Agency,* 213 F.3d 663 (D.C. Cir. 2000). Some of the Respondents have filed a brief in support of the petition challenging the same ruling filed by Appalachian Power Company, *et al.* (No. 00-445).

As Respondents pointed out in their brief supporting the earlier-filed petition, the Environmental Protection Agency ("EPA") rule at issue in these cases effectively charges industrial sources with violations of Section 110 the Clean Air Act, 42 U.S.C. §7410(a)(2)(D), yet the basis for the violations is an extra-statutory construct that conflicts with longstanding precedent. Respondents are concerned that if the ruling in *Michigan v. EPA* stands, EPA will be encouraged to ignore, where expedient, the plain meaning of the Clean Air Act and impose its own "short-cut" interpretation of the statute. Likewise, Respondents are concerned that the ruling left standing will permit EPA to bypass congressional directives regarding when and how regulatory costs should be considered, and impose instead the agency's own judgment. Further, Respondents agree with State Petitioners that EPA's approach has deprived states of the prerogative to determine how to achieve any necessary emissions reductions.

The rule significantly impacts the industrial sector in a manner that Respondents believe Congress did not intend by imposing a burden to reduce emissions based on the cost of controls, rather than the actual emissions contribution of the source or other sources in a given state to another state.

For these reasons and for those expressed in Respondents' brief filed in support of Petition No. 00-445, Respondents urge this Court to grant certiorari in these cases.

Respectfully submitted,

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No. 00-632

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BRIEF OF RESPONDENT SOUTH CAROLINA PUBLIC SERVICE AUTHORITY IN SUPPORT OF PETITIONERS

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY
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QUESTION PRESENTED

Whether, under § 110 of the Clean Air Act, 42 U.S.C. § 7410, the cost of reducing air pollutant emissions is a relevant and proper factor for the United States Environmental Protection Agency ("EPA") to use in determining whether a state is significantly contributing to another state's failure to attain a national ambient air quality standard.

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IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT SOUTH CAROLINA PUBLIC SERVICE AUTHORITY IN SUPPORT OF PETITIONERS

STATEMENT

South Carolina Public Service Authority d/b/a/ Santee Cooper adopts the Statement set forth in the Petition of the State of Michigan *et al.* (Mich. Pet. 3-7). Santee Cooper is a state-owned electric and water utility, and the nation's fourth largest public power system. It operates a number of large electric generating facilities, including coal-fired units directly affected by the NO_X SIP Call. Santee Cooper was a petitioner in the court of appeals. It joined the consolidated brief of parties in the court of appeals who unsuccess-

fully challenged EPA's use of cost factors under § 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994).[1]

ARGUMENT

Santee Cooper urges the Court to grant the *writ of certiorari* sought in this case[2] by Michigan and four other States. One of the petitioners is Santee Cooper's home state, South Carolina. Santee Cooper fully supports South Carolina and the other States petitioning in this docket.

The court of appeals has seriously misconstrued § 110(a)(2)(D)(i)(I) of the Clean Air Act ("CAA"), 42 U.S.C. § 7410(a)(2)(D)(i)(I), by allowing the Environmental Protection Agency ("EPA") to use the cost of reducing air pollutant emissions to determine whether a state is "contributing significantly" to nonattainment of the National Ambient Air Quality Standards (NAAQS) in another state. The language in § 110(a)(2)(D)(i)(I) speaks directly to "significant contribution." That language permits only a quantitative air quality approach, not a cost approach, when EPA determines whether upwind states "contribute significantly" to nonattainment in downwind states. Because §110(a)(2)(D)(I)(i) is clear and unambiguous, even if the Court were to hold in *American Trucking Associations. v. U.S. EPA*, No. 99-1426 (argued November 7, 2000), that costs may be considered by EPA when setting NAAQS under § 109(b) of the CAA, 42 U.S.C. § 7409(b), that holding would not apply to the plainly different language of § 110(a)(2)(D)(i)(I). Since the District of

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[1] Joint Common Issues Brief of Industry Labor Petitioners, D.C. Cir. No. 98-1497 (and consolidated cases).

[2] If the Court grants the petition in this case, it should also grant the two other petitions seeking review of the Court of Appeals' ruling on the "significant contribution" issue: *The States of Ohio and Indiana v. U.S. Environmental Protection Agency, et al.*, No. 00-633 and *Appalachian Power Co., et al. v. U.S. Environmental Protection Agency*, 00-445

Columbia Circuit is the premier appellate forum for resolution of issues under the CAA (42 U.S.C. 7607(d)(1)), and since the court of appeals' determination in this case affects strongly conflicting interests among states across the entire Eastern half of the nation, there are compelling reasons for the Court to grant the writ.

1. The D.C. Circuit's construction of § 110(a)(2)(D)(i)(I) permits the Environmental Protection Agency ("EPA") to make a "significant contribution" determination that is not based on air quality factors. The statute, however, expressly confines "significant contribution" to the emission of "any air pollutant *in amounts which will contribute significantly* to nonattainment in, or interfere with maintenance by, any other State" (emphasis added). Under the court of appeals' reading, the ultimate determination of contribution to nonattainment may be made by EPA on the basis of what the court described as essentially unbounded discretion to decide the appropriate costs for controlling the interstate transport of pollutants. (Mich. Pet. App. 23a).

The D.C. Circuit's endorsement of EPA's construction is inconsistent with the description, elsewhere in its opinion, of the requirements of the statute. The majority expressly ruled that under § 110(a)(2)(D)(i), "EPA must find (1) emissions activities within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment." (Mich. Pet. App. 24a). Under the majority's reading, however, the third factor—which is the crux of § 110(a)(2)(D)(i)(I)—depends on the *costs* of controlling emissions as determined by EPA, rather than on air quality, *i.e.*, the quantitative "amount" of any air pollutant that reaches downwind states. In effect, the statute's quantitative air quality requirement is reduced to a mere preliminary "nominal" determination. The real determination of significance turns on EPA's view of the costs of control. The majority concedes as much. It said:

> EPA's design was to have a lot of states make what it considered modest NO_X reductions, uniformly limited to one that could be achieved (in *EPA's* estimate) *for less than $2,000 a ton.* (Mich. Pet. at 15a) (emphasis added).

The court also conceded that EPA's approach produces variations among states as to the threshold for "contribut[ing] significantly." It observed:

> As a result, naturally, the ultimate line of "significance," whether measured in volume of NO_X emitted or arriving in nonattainment areas, would vary from state to state depending on variations in cutback costs. (Mich. Pet. at 15a).

Further, the court acknowledged that EPA's use of costs, rather than "amounts of pollutants," as the measure of "significant contribution" forces states to order reductions of emissions on the basis of EPA's cost test, not the actual NO_X amounts contributing significantly to downwind nonattainment. It ruled:

> Petitioners claim that . . . where two states differ considerably in the amount of their respective NO_X contributions to downwind nonattainment, under the EPA rule even the small contributors must make reductions equivalent to those achievable by highly-effective measures. This of course flows ineluctably from the EPA's decision to draw the "significant contribution" line on a basis of cost differentials. (Mich. Pet. at 22a).

Treating upwind states that contribute only small amounts of pollutants to downwind nonattainment the same as states that contribute large amounts is flatly inconsistent with the exclusive focus of § 110(a)(2)(D)(I)(i) on air quality factors, through the quantitative term "amounts." Such a construction irrationally permits the large contributors to continue contributing significant amounts to downwind nonattainment to the extent that the costs of reducing such pollution exceed

$2,000. The court's decision to uphold EPA's construction converts the statute's provision for quantity-based variations among upwind states into a one-size-fits-all formula. This revision of Congress' intent can be explained only by the majority's eagerness to advance the proposition that costs should be considered under any regulatory statute unless there is a clear legislative expression to the contrary.

As the petitioning States demonstrate, the plain language in § 110(a)(2)(D)(i)(I) *is* such a clear expression to the contrary. Section 110(a)(2)(D)(i) literally requires that states include in their State Implementation Plans ("SIPs") restrictions on the quantity of pollutants adversely affecting other states. SIPs must prohibit emissions of "any air pollutant in amounts which will contribute significantly to nonattainment," in other states. This plain language should have disposed of the entire case, for the reasons set forth in Judge Santelle's dissent. And, as he also showed, Congress left no room for deference to EPA's construction under *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984). (Mich. Pet. 51a-53a).

By allowing EPA to consider cost factors in its § 110(a)(2)(D)(i) determination, the court of appeals effectively authorizes an extraneous, nonstatutory factor in the agency's "significant contribution" equation. It imposes an irrational uniformity on states regardless of their level of interstate emissions. The decision allows EPA to usurp state authority by shifting to itself initial authority to determine control strategies for achieving compliance with NAAQS.

Such a shift is contrary to the fundamental scheme of the CAA. That scheme vests in the states primary responsibility for implementing National Ambient Air Quality Standards ("NAAQS") developed by EPA under § 109, 42 U.S.C. 7409. They must apply the federal NAAQS to emission sources within their borders. Section 110(a)(2) calls on the states to include in their SIPs "adequate provisions" prohibiting sources within the state from emitting pollutants in amounts

that will contribute significantly to nonattainment or interfere with maintenance of NAAQS in other states. In implementing the NAAQS, the states must, in effect, undertake a triage that allocates the costs and burdens of compliance among the various categories of emission sources they requlate. EPA's reading of § 110(a)(2)(D)(i) as sustained by the court, however, arrogates to the federal government a fundamental element of pollution control strategy—costs—that Congress intended the states to determine and allocate.

The error of the court of appeals' construction of § 110(a)(2)(D)(i)(I) extends beyond interstate transport prevention under that provision. EPA could, with the D.C. Circuit's blessing, apply its version of "highly effective cost controls" to set aside *any* state's determination of the extent that particular in-state sources, or categories of in-state sources, must reduce emissions in order to attain or maintain NAAQS.

2. Whatever the outcome of the cross-petition in *American Trucking*, the D.C. Circuit's misconstruction of § 110(a)(2)(D)(i) is an issue of compelling public importance that independently warrants review by this Court. It involves the core of the CAA's scheme of cooperative federalism. It also involves the crucial question of when costs may be considered by EPA when it implements the various, and differing, provisions of the CAA.

The D.C. Circuit resolves these issues by allowing EPA to use a cost test even where Congress clearly indicates the contrary. Yet EPA takes a different, and inconsistent, approach to § 109 in its merits brief before this Court in the *American Trucking* cross-petition. EPA there argues that costs can be considered "in the NAAQS-implementation process, but not in the NAAQS-setting process." (Br. for Fed. Resp., No. 99-1426 at 16). EPA fails to recognize, however, that the factors within the general category of "implementation" depend on the language of each specific provision within that category.

Some implementation provisions include only air quality factors, while other include cost, technological feasibility, or other considerations as well. Thus, EPA errs in *American Trucking* when it describes the court of appeals' decision in this case as an example of an "appropriate" consideration of costs in the implementation process. Such a use of costs is appropriate, it contends, because "Congress has not expressly prescribed what factors [EPA] should consider in making regulatory determinations." (*Id.* at 41). Nevertheless in the same brief EPA insists that "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." (Br. for Fed. Resp. at 43, *citing American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 510 (1981)).

The *American Textile* principle applies to the CAA. Where Congress intends costs to be considered at a particular stage of "implementation" or other processes under the CAA, it has so specified. *See e.g.*, § 109(d)(2) (advice of adverse economic effects to be included in CASAC reports); § 112(d) 42 U.S.C. § 7412 (d) (emission standards for hazardous pollutants shall take into consideration the cost of achieving emission reductions). There is no basis for applying a different principle to § 110(a)(2)(D)(i)(I).[3]

3. Michigan, South Carolina and the other States have shown in their petition that the consequences of the court of appeals decision are of enormous public importance to upwind and downwind states. Those consequences are also of enormous economic significance to sources of emissions like Santee Cooper, which must bear the actual costs of compliance. This Court should clarify the standard for deciding

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[3] Because § 110(a)(2)(D)(2)(i)(I) clearly excludes costs, costs cannot be even a "secondary factor" for determining significant contribution, contrary to the contention in the petition of States of Ohio and Indiana in their petition in No. 00-633.

when costs may be considered under the CAA in general, and under §110(a)(2)(D)(i) in particular; and the extent to which the *American Textile* principle applies to the varied provisions of this exceedingly complex statute.

CONCLUSION

For the reasons stated in the Petition of the State of Michigan et al., and in this response, the petition for a writ of certiorari should be granted regardless of the outcome of the cross-petition granted in No. 99-1426.

Respectfully submitted,

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IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

-and-

STATE OF MICHIGAN, *et al.*,
Petitioners,

-and-

STATES OF OHIO AND INDIANA,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS NEW YORK, CONNECTICUT, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, PENNSYLVANIA, RHODE ISLAND AND VERMONT IN OPPOSITION TO PETITIONS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the United States Environmental Protection Agency (EPA), in allocating equitably the burden of emission reductions among "upwind" States found to contribute significantly to "downwind" States' nonattainment of the National Ambient Air Quality Standard (NAAQS) for ozone pursuant to section 110(a)(2)(D) of the Clean Air Act, is allowed to consider the relative cost to each upwind State of emission reductions after first determining which States are significant contributors based solely on air quality factors.

2. Whether the court below correctly held that EPA's exercise of its administrative authority to identify the upwind States with emission levels that contributed significantly to nonattainment of NAAQS in downwind States and determine the amount of emission reductions required of upwind States did not violate the non-delegation doctrine.

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The States of New York, Connecticut, Maine, Maryland, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, and Vermont (collectively, the "respondent States") oppose the petitions for certiorari filed by petitioners Appalachian Power Company, *et al.* (hereinafter "Industry petitioners"), State of Michigan, *et al.* (hereinafter "Michigan") and State of Ohio, *et al.* (hereinafter "Ohio"). The petitions seek review of the March 3, 2000 judgment of the United States Court of Appeals for the District of Columbia Circuit upholding the bulk of EPA's NO_x SIP Call rule (the "Rule"). *See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone; Rule*, 63 Fed. Reg. 57356, *et seq.* (1998). For the reasons set forth below, the petitions should be denied, thereby allowing timely implementation of the Rule and enabling the downwind States to meet their statutory obligation to ensure that their residents breathe clean air.

COUNTERSTATEMENT OF THE CASE

In 1998, EPA promulgated the NO_x SIP Call, which requires that twenty-two States and the District of Columbia revise their State Implementation Plans (SIPs) to reduce emissions of nitrogen oxides (NO_x). The Rule was based on overwhelming evidence, undisputed in this case, that emissions of NO_x pollution from numerous sources in many States in the eastern half of the United States contribute to harmful levels of ozone, a pollutant that causes respiratory distress, in many portions of the eastern United States. *See* 63 Fed. Reg. at 57377. Recognizing that many States would have difficulty in achieving the National Ambient Air Quality Standard (NAAQS) for ozone without reductions in the incoming pollution levels, EPA exercised its authority

under section 110 of the Clean Air Act (the "Act") to require emission reductions in all States that contribute to the problem of transported ozone pollution. Implementation of the NO_x SIP Call will ensure that residents of much of the eastern half of the nation, including but not limited to residents of the respondent States, will obtain the benefits of clean air within the timetable set by Congress in the 1990 amendments to the Act.

A. Statutory and Regulatory Background: Establishing and Maintaining the NAAQS

Under sections 108 and 109 of the Act, EPA is responsible for identifying the pollutants that are harmful to public health when present in the ambient air and for establishing the ambient levels of such pollutants that the States are required to achieve. The Act requires EPA to set NAAQS for these "criteria pollutants" at levels that are "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). Under long-standing EPA practice and the holdings of the D.C. Circuit, EPA is to set the NAAQS without regard to the economic ramifications of the levels chosen. *See American Trucking Assns. v. EPA*, 175 F.3d 1027, 1038, *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003, 120 S. Ct. 2193 (2000) (*ATA*); *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).[1] EPA set the NAAQS for ozone at issue in this case in 1979. *See* 44 Fed. Reg. 8202 (1979).

Section 110 of the Act requires each State to submit to EPA a SIP that provides for the attainment of the NAAQS

1. The continuing validity of this principle is being reviewed by the Court in *ATA*.

within the State. The SIP must demonstrate how State regulations will result in the emission reductions necessary to achieve the NAAQS. This Court has held that technical or economic infeasibility does not excuse a State from its obligation to achieve acceptable air quality for its citizens. *See Union Electric Co. v. EPA*, 427 U.S. 246 (1976).

Congress recognized, however, that a State may be prevented from attaining the NAAQS, or at least hampered in its efforts to do so, by pollution transported from other States. Accordingly, just as section 110(a)(2)(A) requires each State to submit a plan to attain the NAAQS, section 110(a)(2)(D) requires each State's plan to ensure that emissions activities within its borders do not "contribute significantly" to nonattainment downwind. This obligation is "intended to equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State." S. Rep. No. 95-127, reprinted in *A Legislative History of the Clean Air Act Amendments of 1977* (1978) at 1416 (the "1977 Senate Report").

B. Transported Ozone Pollution and the NO_x SIP Call

In promulgating the Clean Air Act Amendments of 1990, Congress recognized that regional control strategies were still needed to address the migration of ozone and its precursors:

> The bill reflects an increasing understanding of how ozone pollution is formed and transported. Because ozone is not a local phenomenon but is formed and transported over hundreds of miles and several days, localized control strategies will not be effective in reducing ozone levels.

S. Rep. No. 101-228 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3389, 3399. To develop a regional control strategy for attaining the NAAQS across the eastern half of the United States, all States east of the Rocky Mountains (including the District of Columbia) participated in the working group known as the Ozone Transport Assessment Group (OTAG), which tried to craft a solution to the problem of transported ozone. Although the participating States endorsed OTAG's extensive and sophisticated technical analyses and recognized that region-wide NO_x reductions were needed, the divergent interests of the OTAG States prevented them from agreeing on the details of a control strategy, including the level of NO_x reductions required. In general, the northeastern States, which are downwind of the bulk of the NO_x emission sources, advocated more stringent controls than Ohio, Michigan and the other States joining in the petitions for certiorari, which are host to many of the large NO_x emission sources.

In the absence of a State consensus on all the elements of a NO_x control program, EPA used OTAG's data and analyses to develop the NO_x SIP Call, the rule at issue here. In doing so, EPA evaluated the contribution of NO_x emissions in thirty-seven States east of the Rocky Mountains to ozone noncompliance in a number of eastern, southern and midwestern locations, including the New York City metropolitan area and other urban areas along the eastern seaboard, the Atlanta, Birmingham, Chicago, Cincinnati, Louisville, Pittsburgh and St. Louis metropolitan areas, and southwestern Michigan. *See* 63 Fed. Reg. at 57387. Given the number of source and receptor regions, EPA had to consider hundreds of source/receptor combinations. Using advanced air quality modeling techniques, EPA identified twenty-two States and the District of Columbia as "significant

contributors" to ozone nonattainment in other States, based on its evaluation of the magnitude, frequency and relative amount of each State's contribution to ozone non-attainment in downwind States. *See* 213 F.3d at 675. EPA determined that each of these States was making a significant contribution to ozone nonattainment in at least two other States and, in many cases, in numerous downwind States in different directions and at different distances from the upwind State. *See* 63 Fed. Reg. at 57394, Table II-4.[2] For example, EPA found that Indiana contributes significantly to ozone nonattainment in a number of eastern seaboard areas such as New York City and Baltimore, as well as to the nonattainment problems in Southwestern Michigan (to the north), Cincinnati (to the southeast), Louisville (to the south), and Chicago (to the northwest). Indiana's contribution ranged from an average of 17% to Louisville's ozone levels, 11% to Cincinnati's, 10% to southwestern Michigan's and 9% to Chicago's, to average contributions in the range of 1-2% to ozone levels in eastern seaboard locations.[3]

Once it identified the twenty-three jurisdictions that were significant contributors to at least two downwind ozone nonattainment areas, EPA determined the amount by which each State's NO_x emissions should be reduced to mitigate its significant contribution to numerous downwind States.

2. With the exception of Tennessee, West Virginia and the Carolinas, each of the States identified as significant contributors contains at least a portion of a nonattainment area within its borders.

3. Detailed listing of the contributions to downwind nonattainment of each of the twenty-three jurisdictions subject to the Rule are contained in the *Air Quality Modeling Technical Support Document for the Regional NO_x SIP Call* (September 21, 1998) (which is part of the record before the court below) and summarized at 63 Fed. Reg. at 57387-99.

In so doing, EPA recognized that each upwind State contributes in varying degrees to ozone nonattainment in several downwind States and that each nonattainment area's ozone originated in a number of upwind States. Thus, rather than requiring an upwind State to reduce its emissions by different amounts for each downwind area affected by its emissions, EPA determined that a single level of emission reduction would mitigate the impact of that State's emissions on all downwind States. EPA decided to require only the level of emission reductions that could be obtained in a highly cost-effective manner — that is, at a cost of $2000 per ton or less. *See* 213 F.3d at 675. Rather than requiring each State that contributed significantly to downwind nonattainment to eliminate all its NO_x emissions, EPA concluded that it is fair and consistent with the Act to require upwind States "to reduce *at least* the portion of their emissions for which highly cost-effective controls are available." 63 Fed. Reg. at 57379.

EPA based the $2000/ton figure on "$NO_x$ emissions controls that are available and of comparable cost to other recently undertaken or planned NO_x measures," including "the types of controls EPA and States have needed to adopt most recently because their previous planning efforts have already taken advantage of opportunities for even cheaper controls." *Id.* at 57400. In other words, the $2000/ton figure was based on the costs of controls already being incurred in the downwind States that are burdened by ozone transport. EPA explained that its selection of the $2000/ton criterion was a "first approximation" at determining the level of controls that should be required of upwind sources to eliminate significant contributions to downwind nonattainment and that further reductions may be required in the future if needed to achieve regional ozone nonattainment. *See id.* at 57399.

On the basis of additional modeling, EPA determined that the emissions reductions achieved through application of highly cost-effective measures throughout the region would allow nonattainment areas to make "appreciable progress towards attainment," but would not require more reductions in upwind States than necessary to achieve attainment in all downwind areas affected by those States' emissions. *Id.* at 57379, 57386 n.38, 57389-391. Thus, without requiring any States to implement unduly costly control requirements, the Rule enables all States in the eastern half of the United States to obtain the benefits of clean air for their residents.

C. The Decision of the Court of Appeals

The Rule was challenged by numerous utilities and businesses and by several midwestern and southern states. On March 3, 2000, the Court of Appeals issued its decision upholding the bulk of the NO_x SIP Call. *See Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000). The court first upheld EPA's use of complicated air quality modeling in identifying States as significant contributors. *See id.* at 673-74. It then determined that EPA did not err in using costs in determining the amount of emission reductions required from each State that had been found to contribute significantly to downwind nonattainment. In so doing, the court relied upon its own longstanding precedent that an agency may consider costs unless there is a "clear congressional intent to preclude consideration of cost." *Id.* at 678 (quoting *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987)). The court concluded that the phrase "contribute significantly" in section 110(a)(2)(D) does not express a clear congressional intent to exclude consideration of cost. *See id.* at 679. Without actually determining that the phrase

"contribute significantly" *requires* consideration of costs or equitable factors, the court noted that it would be difficult to draw a line between the level of emissions that are permissible and those that are not without considering costs and other equitable factors. *See id.* at 678. The court below also rejected several other arguments, including a nondelegation challenge. *See id.* at 680-81.[4]

Petitions for rehearing and rehearing *en banc* were denied on June 22, 2000.

REASONS FOR DENYING THE WRIT

None of the petitioners disputes the public health dangers associated with high levels of ozone pollution. Nor do petitioners contest EPA's conclusion that the ozone attainment problems throughout the eastern half of the nation result from emission activity at hundreds of large and small sources of NO_x emissions across the region or its finding that each source State individually contributes to NAAQS non-attainment in numerous downwind States in widely differing amounts. Furthermore, the petitioners agree that EPA has authority under section 110 to require upwind States to revise their SIPs to mitigate their contribution to downwind ozone nonattainment.

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4. The D.C. Circuit did vacate certain aspects of the Rule. It determined that Wisconsin should not have been included in the Rule and that the emission reductions required of Georgia and Missouri should be based solely on the emissions from the portions of those States found to contribute to downwind nonattainment. *See* 213 F.3d at 681-85. It also determined that EPA did not provide sufficient notice of the definition of an electric generating unit and of the control level assumed for large stationary internal combustion engines. *See id.* at 691-94.

Instead, the petitioners' only complaint is with the level of emission reductions required in Ohio, Michigan and the other petitioning States. They claim that EPA misconstrued the term "contribute significantly" in section 110(a)(2)(D) of the Clean Air Act by including costs of controls among the factors considered in determining the amount of emission reduction required of each State that contributes to regional ozone pollution. Although Ohio tries to inflate the importance of the issue by suggesting that EPA's analysis is not "federalism-sensitive," this issue involves routine administrative application of a statutory standard that does not merit review by this Court. In fact, although the various petitioners do not agree on the reasons why EPA's consideration of costs violated the Act, some of them recognize that costs can play a role in the analysis and argue that EPA erred not in considering costs at all, but in the way it considered costs. *Industry Pet.* at 12; *Ohio Pet.* at 10-11.[5]

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5. Michigan adheres to the position that costs should play no role in the analysis, despite acknowledging that the case on which it chiefly relies, *Union Electric*, *supra*, recognizes a role for consideration of costs under section 110. *Michigan Pet.* at 9 n.4.

I.

THE CLEAN AIR ACT AND DECISIONS OF THIS COURT PERMIT EPA'S CONSIDERATION OF COST-EFFECTIVENESS IN IDENTIFYING THE EMISSION REDUCTIONS REQUIRED OF EACH STATE.

A. The Court of Appeals' Decision is Not Inconsistent with Decisions of this Court and the D.C. Circuit Prohibiting the Consideration of Costs in Other Contexts.

Section 110(a)(2)(D) does not specify how EPA should determine what emissions make a significant contribution to downwind States. It does not say that cost-effectiveness of controls or other economic factors are relevant considerations. Nor does section 110(a)(2)(D) preclude the consideration of cost-effectiveness of controls in determining the amount of excess emissions in each State. Accordingly, the Court of Appeals acted properly in concluding that EPA may consider the costs of controlling emissions in determining whether the risk posed by the emissions is significant. *See* 213 F.3d at 677-78 (citing *International Union, UAW v. OSHA*, 37 F.3d 665, 668-69 (D.C. Cir. 1994), and Breyer, *et al.*, *Administrative Law and Regulatory Policy* 65 (4th ed. 1999)).

Both the State petitioners and the Industry petitioners misconstrue the role of costs in EPA's analysis. They attempt unsuccessfully to demonstrate an inconsistency between the D.C. Circuit's decision in this case, which upholds EPA's consideration of costs for the limited purpose of allocating the burdens of emission reductions, and decisions of this Court and the D.C. Circuit addressing EPA's use of cost considerations in unrelated contexts.

1. Industry petitioners' attempt to create the appearance of an inconsistency with other D.C. Circuit cases does not provide a basis for certiorari.

The Industry petitioners' argument that the Court of Appeals' decision is inconsistent with prior D.C. Circuit cases does not support the grant of certiorari in this case. As an initial matter, an alleged conflict between decisions of the D.C. Circuit does not provide a basis for certiorari. Conflicts between decisions of a single court of appeals should be addressed through petitions for rehearing *en banc*, rather than through certiorari. *See, e.g., Davis v. United States*, 417 U.S. 333, 340 (1974) (referencing earlier petition for certiorari that had been denied when conflict was between decisions of the same Circuit); *see also* Stern, *et al., Supreme Court Practice* 176 (7th ed. 1993). Petitioners' suggestion that an inter-circuit conflict over a Clean Air Act issue cannot possibly arise because the D.C. Circuit has sole jurisdiction over appeals of actions and administrative proceedings under the Act (*Michigan Pet.* at 19) is not only irrelevant but simply wrong. EPA's administrative determinations regarding the compliance of SIPs with the requirements of section 110(a)(2)(D) are generally reviewed in the circuit for the state whose SIP is being challenged. *See* 42 U.S.C. § 7607(b). In fact, the challenge to the Missouri SIP in *Union Electric*, upon which Michigan relies, was heard by the Eighth Circuit, not the D.C. Circuit. *See* 427 U.S. at 252-53.

Furthermore, the decisions on which Industry petitioners rely are inapposite to the present case. In *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995), the D.C. Circuit held that a regulation that allowed EPA to prohibit a fuel additive only if it "cause[d] or contribute[d] to failure of any emission

control device" did not provide EPA with the authority to bar the additive on the entirely unrelated ground that it may cause adverse health effects. Likewise, in *American Petroleum Institute v. United States EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) ("*API*"), EPA improperly promulgated fuel content regulations that were directed at promoting the use of renewable fuel sources, rather than at reducing emissions of volatile organic compounds and toxic air pollutants, as required by Congress. These decisions interpreted statutes clearly barring the use of factors that had been erroneously applied by EPA, whereas in this case section 110(a)(2)(D) does not bar the consideration of costs. In fact, EPA's consideration of the relative costs of controlling emissions is consistent with Congressional intent that the burden of controlling interstate pollution be shared by all States that contribute to the problem. *See 1977 Senate Report* at 1416.

Nor did EPA's rule subordinate air quality factors to considerations of cost-effectiveness. Industry petitioners overstate the role of costs in EPA's determination when they contend that EPA "considered as its sole factor the cost-effectiveness of emission reductions in determining whether one state's contribution to another state's ozone nonattainment air quality is 'significant.' " *Industry Pet.* at 13. In fact, as the State petitioners recognize, EPA's determination of whether a State contributed significantly to downwind nonattainment was based solely on air quality factors, with costs playing a role only in determining the amount of emissions to be reduced. *Michigan Pet.* at 5-6; *Ohio Pet.* at 4-5.[6]

6. If Industry petitioners were right that cost of compliance was the sole factor considered by EPA, the Rule would have encompassed all thirty-seven States included in OTAG, rather than just the twenty-

(Cont'd)

Ultimately, Industry petitioners concede that EPA may consider the relative costs of controls in determining the NO_x reductions required of each State, albeit under section 110(k)(5) of the Act rather than section 110(a)(2)(D). *Industry Pet.* at 18. This distinction, however, has no basis in the language of the statute, because, like section 110(a)(2)(D), section 110(k)(5) contains no specific reference to the consideration of costs. If such consideration of costs is valid, it is equally valid under both provisions.

2. Michigan's argument that the Court of Appeals' decision is contrary to this Court's holdings in *Union Electric Co.* and the holding of the D.C. Circuit in *Lead Industries Association* should be rejected because it misconstrues those cases and was not properly preserved for this Court's consideration.

Michigan's primary argument, that prior decisions under sections 109 and 110 of the Act prohibit EPA from considering costs in setting the NAAQS and in reviewing SIPs for compliance with those NAAQS, was not presented to the court below. The cases upon which Michigan now relies — *Lead Industries Association* and *Union Electric* — are cited nowhere in the Brief or Reply Brief filed below by Michigan and other upwind States. The explanation for that omission is simple: the premise of both *Union Electric* and *Lead Industries Association* — that costs and economic

(Cont'd)
two States and the District of Columbia that were ultimately included in the Rule. In fact, those twenty-three jurisdictions were included because the impact of their emissions on downwind States exceeded a certain air quality threshold, not because they contained sources that could be controlled at a cost of less than $2000 per ton.

factors cannot be used to weaken the public health protection provided by the NAAQS — is inconsistent with Michigan's position before the Court of Appeals, where it argued that the emission reductions required by the NO_x SIP Call were more extensive than needed. *See, e.g. Reply Brief of Petitioning States* at 11-12. Now, in an effort to take advantage of the *Union Electric* and *Lead Industries Association* holdings, Michigan shifts gears, suggesting — without any basis in the record and contrary to the results of EPA's modeling — that EPA's consideration of costs somehow weakened the public health protections of the Act.[7]

As an initial matter, this Court should reject Michigan's argument as a basis for *certiorari* because the argument was neither presented to EPA during the public comment process, as required by CAA section 307(d)(7)(B),[8] nor made to the court below. *See, e.g. Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (refusing to consider propriety of award of costs because that issue was not raised in the court of appeals). In fact, Michigan and its co-petitioners were participants in OTAG, which recommended that cost-effectiveness of controls be included as one of the criteria for selection of a strategy to reduce transported ozone. *See* 63 Fed. Reg. at 57363.

In any event, there is no conflict between the decision below and decisions considering the use of costs to reduce

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7. Notably, Ohio (the lead upwind State in the D.C. Circuit proceedings) and Indiana do not join Michigan in this new argument.

8. Section 307(d)(7)(B) provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review."

protections against unhealthy air under other provisions of the Clean Air Act. EPA's consideration of costs did not reduce the level of public health protection at all; in fact, the Rule's emission reduction requirements are the most stringent of the range of possible reductions identified by OTAG. Instead of using cost considerations to reduce public health protection, EPA used relative costs of NO_x reductions to allocate equitably the emission reductions needed to achieve the preexisting public health goal of attainment of the NAAQS. Thus, in the present case, unlike the decisions on which Michigan relies, the consideration of costs is consistent with, rather than contrary to, Congress' intent to protect the public from the adverse health effects of poor air quality.

In *Lead Industries Association,* the D.C. Circuit held that EPA could not, in setting the health-based primary NAAQS, consider the economic feasibility of attaining the NAAQS. The court held that the language of section 109 evidenced a clear Congressional intent that the NAAQS should be set solely on the basis of the need to protect public health. The court emphasized that the NAAQS are intended to be "technology-forcing," meaning that Congress understood and intended that industry would have to develop new technologies, at potentially great cost, to achieve the NAAQS. *See* 647 F.2d at 1149. Similarly, in *Union Electric*, this Court found that EPA need not consider the feasibility of compliance with a SIP in evaluating the sufficiency of a SIP under section 110 of the Act. In that case, Union Electric, an electric utility located in Missouri, challenged EPA's approval of the Missouri SIP on the ground that compliance with the emission limitations contained in the SIP was not technologically and economically feasible. The Court held that EPA may not allow claims of economic and technological

feasibility to excuse a State from submitting a SIP that promotes attainment of the health-based NAAQS. *See* 427 U.S. at 265. Notably, however, the Court recognized that economic factors may be considered as long as "consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards." 427 U.S. at 266.

In the present case, by contrast, EPA's consideration of costs does not interfere with the prompt attainment of the national air quality standards. Congress' goal, as in *Lead Industries Association* and *Union Electric*, is attainment of NAAQS by specific dates. EPA set the requisite ozone NAAQS without regard to economic factors, and EPA's consideration of costs does not reduce the protection provided by the NAAQS to downwind States and their residents. To the contrary, EPA's modeling confirmed that the emission reductions required by the Rule, after consideration of costs, will enable downwind States, including some of the State respondents, to make significant progress towards attainment of the NAAQS.[9] *See* 63 Fed. Reg. at 57379. The costs of reducing NO_x emissions to achieve these NAAQS were considered only in allocating the burden of reducing NO_x emissions among the various States that contribute to ozone

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9. EPA recognized that the downwind States may have to bear an additional burden in attaining the NAAQS because the emission reductions required by the NO_x SIP Call are sufficient to put the NAAQS within reach of all States, but may be insufficient to bring about attainment of the NAAQS in all locations without any further reductions from the downwind States. Of course, EPA could have provided for attainment by raising the cost cut-off from $2000 to a higher level, perhaps $2500. It is the downwind States that support the Rule that may have to implement the higher level of controls themselves, not upwind States like Michigan.

nonattainment in the eastern United States, thereby effectuating Congress' intent to apportion equitably the burden of emission reduction efforts. Far from "interfer[ing] with the primary congressional purpose of prompt attainment of the national air quality standards," the NO_x SIP Call rule makes such attainment possible throughout the eastern portion of the United States without requiring any unneeded emission reductions.[10] In the absence of this Rule, regions that are home to millions of Americans will not achieve the NAAQS within the timetable set by Congress. *Id.* at 57363.

B. The Upwind States' Argument that the NO_x SIP Call Rule Violates Principles of "Federalism" and "State Sovereignty" is Meritless and does not Provide a Basis for Certiorari.

The State petitioners contend that EPA misallocated the burden of emission reductions among the States. Michigan and Ohio (and their co-petitioners) evidently believe that EPA's method of apportioning the burden of compliance in accordance with the costs of controlling the emissions results in sources in those States bearing a greater share of emission reductions than they would like. In an attempt to disguise their challenge to EPA's method as a subject that might merit

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10. EPA's use of costs in this case is similar to the waiver process approved by this Court in *Union Electric*. The Court determined that States are free to exempt facilities or industry groups from control requirements under the SIP on grounds of economic infeasibility so long as doing so does not interfere with attainment of the NAAQS. *See* 427 U.S. at 266-67. Likewise, here EPA is free to exclude sources that cannot be controlled in a highly cost-effective manner from its calculation of State budgets, as long as doing so does not interfere with attainment of the NAAQS.

this Court's review, Ohio contends, without supporting its position and without citation to case law, that EPA's application of section 110 is somehow inconsistent with unspecified principles of "federalism" or "state sovereignty."

Underlying this argument is the State petitioners' failure to recognize that each upwind State contributes to varying degrees to numerous downwind States. For example, State petitioners note that Indiana and Pennsylvania are being required to reduce their emissions by approximately the same amount, even though Pennsylvania's impact on the downwind New York City nonattainment area is greater. *Ohio Pet.* at 12-13; *Michigan Pet.* at 22-23. The State petitioners ignore, however, that Indiana emissions have a much greater effect than Pennsylvania emissions on other nonattainment areas that are closer to Indiana, such as Louisville (to which Indiana contributes an average of 17% of the ozone and Pennsylvania less than 1%), Cincinnati (Indiana 11%; Pennsylvania 1%), Southwestern Michigan (Indiana 10%; Pennsylvania less than 1%) and Chicago (Indiana 9%; Pennsylvania less than 1%). Thus, shifting the focus from New York City to Cincinnati, Chicago or Louisville as a receptor area would mean that it is Pennsylvania, rather than Indiana, that is being required to obtain excess emission reductions under the Rule. Considering that each upwind State contributes varying amounts of ozone to numerous downwind States, EPA's approach recognizes the impossibility of requiring that a State reduce its emissions by different amounts for each downwind State to which it contributes.

Ultimately, EPA's allocation methodology follows from its recognition that nonattainment throughout the eastern half of the United States is the result of the collective contribution

of countless sources throughout the area, a finding that is being challenged by none of the Petitioners. In light of the regional nature of the ozone nonattainment problem, the Rule effectuates Congressional intent to allocate the burden of compliance among the States containing sources that contribute to the problem. Notwithstanding State petitioners' attempt to disguise their challenge as a defense of federalism, their argument that EPA could or should have allocated the emission reductions differently does not implicate principles of State sovereignty.

II.

THE COURT BELOW CORRECTLY REJECTED PETITIONERS' NONDELEGATION ARGUMENTS.

The Industry petitioners' effort to obtain review of the D.C. Circuit's nondelegation holding fails for several reasons. First, and most fundamentally, the delegation at issue in this case is narrower than the broad delegations that have been upheld by this Court. *See, e.g. Touby v. United States*, 500 U.S. 160 (1991); *United States v. Mistretta*, 488 U.S. 361, 371-72 (1988); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *FPA v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944); *Yakus v United States*, 321 U.S. 414 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943).

Second, the Court of Appeals correctly concluded in this case that the nondelegation doctrine does not require as precise a delegation when the agency action is of more limited scope than a broad legislative rule of nationwide application. In this case, in exercising its authority under section 110(a)(2)(D), EPA did not issue a quasi-legislative rule, but

rather made quintessentially administrative, fact-specific determinations regarding dozens of state-to-state comparisons:

> [A]s a practical matter EPA must make a number of threshold determinations that in practice appear to have confined the statute to a modest role. Before assessing "significance," EPA must find (1) emissions activity within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment.

213 F.3d at 680. *See also* H.R. 95-294, 330 95th Cong. 1st Sess., reprinted in 4 *A Legislative History of the Clean Air Act Amendments of 1977,* 2797 (1978) (describing the interstate transport provisions of the Act as "a Federal mechanism for resolving disputes which cannot be decided through cooperation and consultation between the States or persons involved"). Congress' delegation of authority to make this type of fact-specific, case-by-case determination does not implicate the non-delegation doctrine, which bars only the delegation of *legislative* power. *See Touby*, 500 U.S. at 165 (the nondelegation doctrine means "that Congress may not constitutionally delegate its legislative power to another branch of government.").

Recognizing the limitations of the legislative process, this Court's precedent establishes that administrative agencies must have ample leeway to apply Congress' policy choices on a case-by-case basis, as EPA did in this case. In *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946), this Court recognized that Congress cannot oversee the application of its policy choices to all the specific factual circumstances that may arise:

> The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.

329 U.S. at 105. *See also SEC v. Chenery*, 332 U.S. 194, 202-03 (1947) ("the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399-400 (1940) (referring to the need for the agency to use its expertise in applying the policy expressed in a statute to particular factual circumstances).

Indeed, the D.C. Circuit understood in *ATA* that EPA's exercise of its authority to review efforts to implement NAAQS, as in this case, did not implicate the same non-delegation concerns as the establishment of the NAAQS. In *ATA*, the Court of Appeals distinguished the decision of the First Circuit in *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974), which, like the court below, upheld EPA's authority to determine the steps necessary to achieve a NAAQS against a nondelegation challenge:

> [T]he action challenged in *South Terminal* was EPA's adoption of a plan for ending or preventing

> violations in Boston of already-established NAAQS, not its promulgation of the NAAQS themselves. Thus, it seems likely that the "means" were the plan's provisions . . . and the "fairly precise[ly] defin[ed]" goals were the NAAQS themselves.

ATA, 175 F.3d at 1057. As in *South Terminal Corp.*, the action challenged here is EPA's adoption of a plan intended to end violations of the NAAQS. Thus, both courts of appeals to consider the issue have concluded that section 110 does not present a nondelegation problem.[11]

Finally, notwithstanding petitioners' claim that EPA's action is "unfettered by any obligation to obey Congress' proscription against arbitrary and capricious action" (*Industry Pet.* at 20), a reviewing Court is free to evaluate EPA's significant contribution determinations under an arbitrary and capricious standard, after giving due deference to its interpretation of the statute and its technical determinations. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) (deferring to agency's interpretation of statute that it was charged with administering). The D.C. Circuit did just that when it rejected EPA's inclusion of Wisconsin and the "coarse grid" portions of Georgia and Missouri in the rulemaking. Accordingly, there is no basis to the petitioners' non-delegation challenges.

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11. Furthermore, the decision in *ATA* upon which petitioners rely was incorrect for the reasons set forth in the briefs filed by the EPA, the northeastern States and other petitioners in *Browner v. American Trucking Ass'ns*, U.S. Supreme Court Nos. 99-1257, 99-1263 and 99-1265 (argued on November 7, 2000). Respondent Massachusetts seeks reversal of the D.C. Circuit's decision in *ATA* as a party in those cases and respondents New York, Connecticut, Maine, Maryland, New Hampshire, Rhode Island, and Vermont have all joined in an amicus curiae brief in those cases, supporting reversal of *ATA*.

CONCLUSION

For all the foregoing reasons, the Court should deny the petitions for certiorari.

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Nos. 00-445, 00-632 and 00-638

In The

Supreme Court of the United States

STATE OF MICHIGAN, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether EPA may, under Sections 110(a)(2)(D) and 110(k)(5) of the Clean Air Act, consider cost as one of several factors in determining the amount of emissions reductions that a state must make to adequately mitigate emissions that are significantly contributing to another state's failure to attain a national ambient air quality standard.

2. Whether EPA's action in considering cost as a factor under Sections 110(a)(2)(D) and 110(k)(5) represents a constitutionally permissible exercise of the authority delegated to EPA by Congress.

PARTIES TO THE PROCEEDINGS

1. The following Parties were petitioners in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

In No. 98-1497, State of Michigan, Michigan Department of Environmental Quality and State of West Virginia, Division of Environmental Protection.
In No. 98-1588, State of Ohio.
In No. 98-1596, Commonwealth of Virginia.
In No. 98-1615, State of Alabama, *ex. rel.* Bill Pryor, Attorney General.
In No. 98-1617, State of Indiana and Indiana Department of Environmental Management.
In No. 98-1619, State of North Carolina.
In No. 98-1621, State of South Carolina.
In No. 98-1499, United Mine Workers of America.
In No. 98-1500, Appalachian Power Company, *et al.*, consisting of:
Appalachian Power Company;
Baltimore Gas and Electric Company (now referred to as Constellation Power Source Generation, Inc.);
Carolina Power & Light Company;
Central and South West Services, Inc.:
Central Power and Light Company;
Public Service Company of Oklahoma;
Southwestern Electric Power Company;
West Texas Utilities Company;
Central Illinois Light Company;
Central Illinois Public Service Company;
CINergy;
Columbus Southern Power Company;

PARTIES TO THE PROCEEDINGS – Continued

Commonwealth Edison Company;
Consumers Energy Company;
Dayton Power and Light Company, The;
Detroit Edison Company, The;
Duke Energy Company;
Florida Power Corporation;
Illinois Power Company;
Indiana Michigan Power Company;
Jacksonville Electric Authority;
Kentucky Power Company;
Kentucky Utilities Company;
Louisville Gas and Electric Company;
Madison Gas and Electric Company;
Minnesota Power Company;
Monongahela Power Company, d/b/a Allegheny Power System, Inc.
Northern Indiana Public Service Company;
Oglethorpe Power Corporation;
Ohio Power Company;
Ohio Valley Electric Corporation;
Oklahoma Gas & Electric Company;
Otter Tail Power Company;
PacifiCorp Electric Operations;
Plains Electric Generation & Transmission Cooperative, Inc.;
Potomac Edison Company, The, d/b/a Allegheny Power System, Inc.;
Potomac Electric Power Company;
Public Service Company of New Mexico;
Salt River Project;
South Carolina Electric & Gas Company;
Southern Company:
Alabama Power Company;
Georgia Power Company;
Gulf Power Company;

PARTIES TO THE PROCEEDINGS – Continued

Mississippi Power Company;
Savannah Electric and Power Company;
Tampa Electric Power Company;
Tucson Electric Company;
Union Electric Company;
Virginia Power;
West Penn Power Company, d/b/a Allegheny Power System, Inc.;
Edison Electric Institute;
National Rural Electric Cooperative Association; and
American Public Power Association.

In No. 98-1500, Duquesne Light Company.

In No. 98-1501, Midwest Ozone Group.

In No. 98-1502, West Virginia Chamber of Commerce.

In No. 98-1504, National Mining Association.

In No. 98-1518, West Virginia Manufacturers Association.

In No. 98-1556, City of Springfield, Missouri through the Board of Public Utilities, d/b/a City Utilities of Springfield, Missouri.

In No. 98-1567, Kansas City Power & Light Company;
St. Joseph Light & Power Company;
The Empire District Electric Company;
Utilicorp United, Inc.;
City of Independence, Missouri; and
Associated Electric Cooperative, Inc.

In No. 98-1573, Indianapolis Power & Light Company.

In No. 98-1585, The Alabama Forestry Association, Inc., by and through its section The Alabama Pulp and Paper Counsel.

In No. 98-1590, Dairyland Power Cooperative.

PARTIES TO THE PROCEEDINGS – Continued

In No. 98-1598, South Carolina Public Service Authority, d/b/a Santee Cooper.
In No. 98-1601, American Municipal Power-Ohio.
In No. 98-1602, Fort James Operating Company;
Gilman Paper Company;
Rayonier, Inc.;
Savannah Electric & Power Company;
Southeast Paper Manufacturing Company; and
International Paper Company.
In No. 98-1608, PP&L, Inc.
In No. 98-1609, Council of Industrial Boiler Owners.
In No. 98-1611, Network for Workable Air Policies.
In No. 98-1616, Georgia Coalition for Sound Environmental Policy, Inc.
In No. 98-1618, Interstate Natural Gas Association of America.
In No. 99-1070, Appalachian Power Company, *et al.*
In No. 99-1093, Wisconsin Paper Council;
Madison Gas and Electric Company;
Northern States Power Company;
Wisconsin Public Service Corporation; and
Wisconsin Manufacturers & Commerce.

2. The following Party was a Respondent in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

U.S. Environmental Protection Agency.

3. The following Parties were Intervenors in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

Natural Resources Defense Council;
Environmental Law & Policy Center of the Midwest;

PARTIES TO THE PROCEEDINGS – Continued

American Lung Association of Metropolitan Chicago;
Appalachian Mountain Club;
Citizens Action Coalition of Indiana, Inc.;
Clean Air Council;
Environmental Defense Fund (now referred to as Environmental Defense);
Group Against Smog and Pollution;
Hoosier Environmental Council;
Illinois Environmental Council;
Izaak Walton League of America;
Legal Environmental Assistance Foundation;
Michigan Environmental Council;
National Environmental Trust;
Natural Resources Council of Maine;
New York Public Interest Research Group;
Ohio Citizen Action;
Ohio Environmental Council;
U.S. Public Interest Research Group; and
Wisconsin's Environmental Decade Institute.

State of New York;
State of Connecticut;
State of Maine;
Commonwealth of Massachusetts
State of New Hampshire;
Commonwealth of Pennsylvania;
State of Rhode Island; and
State of Vermont.

State of Maryland.

State of Wisconsin.

Province of Ontario, Canada;
Norman W. Sterling, Minister of the Environment, Province of Ontario;

PARTIES TO THE PROCEEDINGS – Continued

Charles A. Harnick, Attorney General of the Province of Ontario; and
Christopher Carl Haromy.

Appalachian Power Company, *et al.*
(listed in paragraph 1. *supra*).

Dairyland Power Cooperative.

Virginia Manufacturers Association.

South Carolina Public Service Authority, d/b/a Santee Cooper.

Detroit Public Lighting;
Grand Haven Board of Light and Power;
Holland Board of Public Works;
Lansing Board of Water and Light;
Marquette Board of Light and Power;
Michigan South Central Power Agency; and
City of Wyandotte Department of Municipal Service.

GPU Generation, Inc.

American Gas Association.

Interstate Natural Gas Association of America.

Network for Workable Air Policies.

Business Council of Alabama.

Michigan Manufacturers Association.

Consolidated Edison Co. of New York, Inc.;
KeySpan Generation LLC;
Niagara Mohawk Power Corporation;
PECO Energy Company;
Public Service Electric and Gas Company;
Rochester Gas & Electric Corporation; and
PG&E Generating.

PARTIES TO THE PROCEEDINGS – Continued

Natural Gas Supply Association; and
Sempra Energy.

Associated Industries of Massachusetts;
New England Council; and
New Jersey State Chamber of Commerce.

PP&L, Inc.;
Atlantic City Electric Company; and
Delmarva Power & Light Company.

4. The following were *Amici* in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

Government of Canada.

North Carolina Citizens for Business and Industry.

South Carolina Chamber of Commerce;
Environmental Management Association of South Carolina; and
South Carolina Manufacturers Alliance.

Toledo Metropolitan Area Council of Governments.

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BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

INTRODUCTION

Three petitions for certiorari have been filed seeking review of portions of a March 3, 2000 decision of the United States Court of Appeals for the District of Columbia ("D.C. Circuit").[1] That decision largely upheld the Environmental Protection Agency's ("EPA's" or the "Agency's") 1998 rule requiring reductions in nitrogen oxide ("NOx") emissions in 22 states and the District of Columbia that EPA found to be "contributing significantly" to the failure of many states in the Eastern United States to attain the 1-hour ozone National Ambient Air Quality Standard ("NAAQS"). "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," 63 Fed. Reg. 57,356 (Oct. 27, 1998) (hereinafter "NOx SIP Call Rule" or "Rule"). In particular, the D.C. Circuit held that EPA, in determining the level of emissions that were contributing significantly to downwind nonattainment and thus needed to be reduced, properly considered the costs of controlling those emissions. All three petitions seek review of this finding on the grounds that it violates the Clean Air Act (the "Act"), although Petitioners do not agree on what approach Congress intended EPA to take. The States of Michigan, Alabama, West Virginia, Virginia

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[1] *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) (*"Michigan"*), *reprinted at* Appendix of the Petition for a Writ of Certiorari of Appalachian Power Co., *et al.* (No. 00-445, Sept. 20, 2000) ("Ind. Pet., App.")

and South Carolina ("Michigan") (No. 00-632) assert that EPA cannot consider costs at all. The States of Ohio and Indiana ("Ohio") (No. 00-633), on the other hand, claim that EPA may consider costs, but only as a "subordinate factor."[2] Finally, a group of industries and industry trade associations led by Appalachian Power Company ("Industry" or "Industry Petitioners") (No. 00-445) claim that EPA may not consider costs when determining "significant contribution," but may do so when determining how much of that contribution must be eliminated. Industry Petitioners also claim that EPA's consideration of cost factors violated the so-called "non-delegation" doctrine.

Environmental group intervenor-respondents in the D.C. Circuit case below[3] respectfully submit that none of

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[2] State petitioners below were Ohio, Indiana, Michigan, Alabama, South Carolina, Virginia, West Virginia and North Carolina. These states combined their efforts in briefing and arguing the case before the D.C. Circuit. North Carolina has not filed a petition for certiorari with this Court, and Ohio and Indiana have filed a petition separate from that filed by Michigan, Alabama, South Carolina, Virginia and West Virginia.

[3] Environmental organizations participating as intervenor-respondents in the case below, and who join in this Opposition are: American Lung Association of Metropolitan Chicago, Appalachian Mountain Club, Citizens Action Coalition of Indiana, Clean Air Council, Environmental Defense (formerly known as Environmental Defense Fund), Environmental Law & Policy Center of the Midwest, Group Against Smog and Pollution ("GASP"), Hoosier Environmental Council, Illinois Environmental Council, Izaak Walton League of America, Legal Environmental Assistance Foundation, Michigan Environmental Council, National Environmental Trust, Natural Resources Council of Maine, Natural Resources Defense

these petitions merit this Court's review. There is no conflict between the D.C. Circuit's decision and decisions of this Court or other federal appellate courts. The D.C. Circuit's resolution of the questions presented in the certiorari petitions is amply supported by applicable precedent and is correct.

STATEMENT OF THE CASE

Petitioners' Statements describe EPA's authority to implement the NAAQS for ozone through issuance of a "SIP call" under Clean Air Act Section 110(k)(5), by which the EPA Administrator may find inadequate state implementation plans ("SIPs") and require states to revise such SIPs to correct the deficiencies. 42 U.S.C. § 7410(k)(5). One of the possible bases for a SIP call is an EPA finding under Section 110(a)(2)(D)(i)(I) of the Act that a SIP does not contain adequate provisions to prohibit air pollution in that state "in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance [of a NAAQS] by, any other State." 42 U.S.C. § 7410(a)(2)(D)(i)(I). These provisions are designed to ensure that the cumulative impacts of many states' upwind air pollution do not foul the air downwind so badly that any downwind state is forced to bear more than its share of the burden of ensuring that its air does not violate the NAAQS; or alternatively, bear more than

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Council, New York Public Interest Research Group, Ohio Citizen Action, Ohio Environmental Council, U.S. Public Interest Research Group, and Wisconsin's Environmental Decade Institute.

its share of the public health consequences of dirty air. *See* S.Rep. No. 95-127 at 41-42, *reprinted in* 3 A Legislative History of the Clean Air Act Amendments of 1977 ("1977 Leg. Hist.") 1415-16 (Comm. Print 1978).

In the case of the ozone NAAQS, each upwind area contributes to the total ozone burden in downwind areas in many states. 63 Fed.Reg. 57,356, 57,394-396, Tables II-4 to II-7. Put another way, because of the nature of ozone pollution and its transport, the pollution in any upwind area will impact the area and the state immediately downwind as well as more distant states.

Ozone is formed when NOx and volatile organic compounds ("VOCs") interact in the presence of sunlight. Once ozone has been created, it drifts downwind, along with its NOx precursor (VOCs are very localized in their effects, and are not transported with the air mass to any great extent). *Id.* at 57,381. The D.C. Circuit has correctly recognized that "as the air mass moves [downwind], ozone levels often continue to increase, in part because ozone has more time to develop, in part because the air mass picks up more precursors along the way. Ultimately, this process can bring high ozone levels to areas hundreds of miles downwind of the pollution sources." *Virginia v. EPA*, 108 F.3d 1397, 1400, *modified on reh'g on other grounds*, 116 F.3d 499 (D.C. Cir. 1997). The creation of downwind ozone pollution therefore is non-linear and cumulative.[4] For each separate meteorological ozone

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[4] Petitioners argue that NOx, the precursor chemical primarily associated with transported ozone, both creates and destroys ozone. Ind. Pet. at 8 & n. 4. This statement is incorrect – although strictly localized increases in ozone can occur in areas immediately adjacent to facilities which reduce their NOx

event, downwind areas receive ozone and NOx from many upwind states, and each upwind area contributes to downwind pollution events in many different states. 63 Fed. Reg. 57,356, 57,394-396.

The NOx SIP Call Rule was a partial response – five years overdue – to the mandate contained in the 1990 Clean Air Act that all states with ozone serious nonattainment areas must adopt plans no later than November 1994 to correct the nonattainment problem. 42 U.S.C § 7511a(c)(2). As part of a negotiated stay of litigation over EPA's extensions to states of the statutory attainment demonstration deadlines, the Ozone Transport Assessment Group ("OTAG") was created. 62 Fed. Reg. 60,318, 60,323 (Nov. 7, 1997). In OTAG, 37 states came together to complete regional modeling and reach regional solutions to the interstate ozone transport problem. The technical work done by OTAG utilized "the most complete, scientifically-credible tools and data available" (*id.* at 60,331), and included state-of-the-art air quality modeling, at the regional and subregional levels, to which EPA added state-specific refinements. 63 Fed. Reg. 57,356, 57,387, 57,390-391.

The combination of the cumulative, nonlinear nature of ozone production and the Agency's statutorily-defined duty under Sections 110(a)(2)(D)(i)(I) and 110(k)(5) of the Act meant that EPA, faced with OTAG's indisputable

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emissions, it is not correct to say that NOx "destroys" ozone in any sense. Indeed, *transported* ozone – the subject of the EPA Rule and this case, does not decrease when NOx emissions are increased; rather transported ozone decreases when NOx emissions are *decreased*. *See* 63 Fed. Reg. 57,356, 57,424-425, 57,439-441.

evidence of pollutant transport across state lines, was required to distribute responsibility among all the upwind states to adopt controls on sources contributing to ozone nonattainment and maintenance problems in all downwind states.

EPA implemented the OTAG findings, making a state-by-state assessment of emissions contributions to downwind nonattainment and maintenance problems, and apportioning responsibility for the needed NOx reductions based on the emissions modeling and the availability of additional highly cost-effective controls in each of the states. *Id.* at 57,376-378, 57,389-391. From this multi-faceted analysis, EPA developed state-by-state NOx emissions "budgets," which each state may meet by any means available to it. *Id.* at 57,426.

State and Industry Petitioners challenged EPA's resulting NOx SIP Call Rule in the D.C. Circuit, alleging that the Agency's consideration of the availability of cost-effective control measures in defining significant contributions from upwind to downwind states violated the Clean Air Act. State Petitioners also argued that EPA's actions violated the Constitutional non-delegation doctrine.

The D.C. Circuit upheld the EPA Rule on both counts, noting that the term "significant" does not require an unidimensional (health only) analysis, and that the various petitioners were not only in conflict over this point, but had "conspicuously fail[ed] to describe the intellectual process by which EPA would determine 'significance' if it may consider only health." Ind. Pet., App. at 21a, 22a. The court went on to hold that there is nothing in the D.C. Circuit's case law, or in "the text, structure, or

history of the Clean Air Act that bars EPA from considering cost" in this analysis. Ind. Pet., App. at 25a.

On the non-delegation question, the State Petitioners did not allege that the Clean Air Act itself violated the non-delegation doctrine, but rather challenged as an unbounded exercise of Agency discretion the EPA's action in selecting the $2000/ton cost-effectiveness point as an element of the significance determination. The D.C. Circuit upheld the Agency's action against this charge, noting that the non-delegation doctrine is itself limited in its application. It was significant to the court that the Agency's action was both constrained by the statutory factors of the significance analysis, and limited geographically, so that the scope of the Rule did not " 'encompass all American enterprise'." Ind. Pet., App. at 27a-28a (quoting *International Union, UAW v. OSHA ("Lockout/Tagout I")*, 938 F.2d 1310, 1317 (D.C. Cir. 1991)). The D.C. Circuit refused requests for rehearing *en banc*, over a single dissent.[5]

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[5] Judge Sentelle dissented, as he had on the merits. Judges Tatel and Garland did not participate in considering whether to grant rehearing *en banc*. Order Denying Reh'g *En Banc* in No. 98-1497 and consolidated cases, June 22, 2000, *reprinted at* Ind. Pet., App. at 64a.

REASONS FOR REJECTING THE PETITIONS FOR REVIEW

I. THIS COURT SHOULD DENY CERTIORARI ON THE "SIGNIFICANT CONTRIBUTION" QUESTIONS.

The only question raised by the Petitions of Ohio and Michigan, and the primary one raised by that of Industry, is whether – or how much – EPA may consider cost as a factor in finding that certain sources are producing NOx emissions that "contribute significantly" to nonattainment in another state within the meaning of Section 110(a)(2)(D)(i)(I) of the Act. As discussed *infra* at Section I.B., Congress did not define the term "contribute significantly." Therefore, EPA's interpretation of the term is entitled to considerable weight under the settled law of this Court, and should be upheld unless it is impermissible. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984) (*"Chevron"*). In other words, this is a case that is properly decided under "step two" of the *Chevron* analysis, not "step one." The D.C. Circuit's decision finding permissible EPA's inclusion of cost in the factors considered in determining the significance level of upwind state contributions to downwind nonattainment is completely consistent with the established case law of this Court and the Courts of Appeals.

As the D.C. Circuit noted, in the proceeding below neither the State nor Industry Petitioners could make up their minds as to whether or how Congress intended EPA to consider cost in determining what contributions to nonattainment are "significant." *See* Ind. Pet., App. at

17a-20a. Initially, the States argued that EPA could consider cost, but could not make it the controlling factor in determining significance. *Id.* However, "[a]t oral argument, counsel for the States abandoned this position and decided that the statute flatly prohibits EPA from considering costs at all." Ind. Pet., App. at 18a-19a. On the other hand, Industry initially argued below that EPA could consider only "air quality impacts," not costs. Industry presented a different position at oral argument, however, claiming that while EPA could not consider costs under Section 110(a)(2)(D) of the Act (in determining whether a SIP prohibits emissions from sources that "significantly contribute" to nonattainment), it nevertheless could consider costs under Section 110(k)(5) (in determining whether a SIP is "adequate"). Ind. Pet., App. at 20a.

Petitioners still do not agree on how Congress intended EPA to treat costs in issuing a "SIP call" under Sections 110(a)(2)(D) and 110(k)(5) of the Act, presenting three inconsistent positions to this Court. Industry's Petition argues that EPA may consider cost in determining the proper level of emission reductions required to correct an interstate pollution transport problem, but only under Section 110(k)(5)'s adequate mitigation language and not under Section 110(a)(2)(D)'s significant contribution language. Ind. Pet. at 13, 18. The State Petitions now contain two distinct variations of the cost argument. The Michigan Petition argues that EPA cannot consider cost at all. Michigan Pet. at 12-13, 19. On the other hand, the Ohio Petition appears to argue that cost may be a factor in EPA's determination of what contributions are significant, but only a subordinate factor. Ohio Pet. at 11, 15. Different petitioners have the right, of course, to raise

different theories of their case. But in this case these disparate interpretations raise the obvious question – if Congressional intent here is so clear, then why can't Petitioners agree on what that intent was?

A. The D.C. Circuit's Holding that EPA's Interpretation of "Significant Contribution" is Permissible Does Not Conflict with the Decisions of this Court or with Other Decisions of the D.C. Circuit.

Petitioners claim that the D.C. Circuit's decision upholding EPA's consideration of cost as a factor in determining when a contribution to downwind nonattainment is "significant" conflicts with various decisions of this Court and other decisions of the D.C. Circuit. Petitioners are wrong.

First, Petitioners claim that the lower court's decision conflicts with the decision of this Court in *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976) (*"Union Electric"*). *See* Michigan Pet. at 14-19. However, *Union Electric* is not on point here. In that case, this Court was faced with a polluter's challenge to EPA's approval of a SIP on the grounds that EPA was required to consider whether the state's choice of controls in the SIP were economically or technologically infeasible. This Court upheld EPA's position[6] that it was not authorized to reject a SIP on such grounds, finding that Congress had set out minimum requirements that a SIP must meet in order to obtain EPA approval, and

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[6] The Court noted that "we have previously accorded great deference to the Administrator's construction of the Clean Air Act [citations omitted]." *Union Elec.*, 427 U.S. at 256.

that the three-year deadline for achieving the NAAQS set by Congress "leaves no room for claims of technological or economic infeasibility." *Union Elec.*, 427 U.S. at 256-260. The Court stated that the Act's minimum compliance requirements are of a "technology-forcing" nature, and "are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." *Id.* at 257. The Court also made clear, however, that as long as a state plan would achieve attainment and meet the minimum requirements of the Act, the states were free to choose particular measures needed to accomplish that task, and were free to consider infeasibility claims in so doing. *Id.* at 260-265. Indeed, the Court stated explicitly that "we do not hold that claims of infeasibility are never of relevance in the formulation of an implementation plan. . . . " *Id.* at 266.

The instant case is entirely different from *Union Electric*. Neither the EPA nor the Court is faced here, as the Court was in *Union Electric*, with the implications of the "technology-forcing" character of the Act's attainment requirements. We are not concerned here with the question of whether all measures that are or could be contained in an implementation plan will in the aggregate be adequate to achieve timely attainment of the ozone NAAQS,[7] or whether additional measures that may not

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[7] As the Court recognized in *Union Electric*, "the [Act does] allow claims of technological and economic infeasibility to be raised in situations where consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national standards." *Union Elec.*, 427 U.S. at 266.

be technologically or economically feasible must be included in such a plan.

Attainment of the NAAQS in a state impacted by emissions transported across its borders requires a combination of in-state and upwind state emission control measures. Section 110(a)(2)(D) does not place the entire burden of downwind attainment on upwind states, because it does not require the elimination of all upwind emissions necessary for a downwind state to achieve attainment.[8] If it did, *Union Electric* might well prohibit EPA from considering cost in determining the level of required upwind emission reductions, at least if the effect of such consideration would be the failure to achieve downwind attainment. Here, however, Congress has authorized EPA to require the elimination of some – but not all – upwind emissions, specifically those that "contribute significantly" to downwind attainment problems. In this sense, Section 110(a)(2)(D)(i)(I) is similar to other provisions in the Act that specifically target certain emissions or emission sources that represent but a portion of the overall reductions necessary to achieve attainment. In the context of such specific implementation measures, EPA has often been permitted, and in some cases,

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[8] EPA so stated in the NOx SIP Call Rule, noting that even after implementation of its rulemaking reducing upwind emissions, some downwind areas will require additional local reductions. *See*, 63 Fed. Reg. 57,356, 57,374, 57,377, 57,403.

required, to consider issues of technological and economic feasibility, or of cost or cost-effectiveness.[9]

Furthermore, unlike *Union Electric*, this case does not involve a claim that a state's choice of emission controls in its implementation plan is technologically or economically infeasible. Indeed, this case does not deal with a state's choice of emission controls at all. Rather, this case involves EPA's interpretation of its own authority to find that a state has failed to control interstate emissions as mandated by Congress and to impose a remedy for that failure.[10] Finally, the present case does not deal with claims of technical or economic infeasibility, but rather

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[9] For cases in which the D.C. Circuit has found that EPA can lawfully consider costs in Clean Air Act rulemaking, *see, e.g., George E. Warren Corp. v. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds*, 164 F.3d 676 (D.C. Cir. 1999) (examining Clean Air Act Section 211, 42 U.S.C. § 7545, providing for the regulation of reformulated gasoline); *NRDC v. EPA*, 937 F.2d 641 (D.C. Cir. 1991) (upholding EPA's use of cost-benefit analysis to determine that a particular polluting source should not be classified as "major" under Section 165 of the Act, 42 U.S.C. § 7475).

Congress also has specifically allowed or required EPA to consider costs in connection with a variety of specific emission reduction measures; *see, e.g.*, 42 U.S.C. § 7521(a)(3)(A)(i) (mobile source standards); 42 U.S.C. § 7545(c)(2)(B) (fuel additive regulation); 42 U.S.C. § 7411(a)(1), (b)(1) (certain new stationary source standards); 42 U.S.C. § 7547(a)(3) (nonroad vehicle compliance deadlines); 42 U.S.C. § 7571(b) (aircraft compliance deadlines); and 42 U.S.C. § 7511b(b)(3) and (4), (e)(1) (certain control techniques guidelines for VOCs).

[10] This Court in *Union Electric* explicitly did not reach the question of whether EPA could consider factors of economic or technical infeasibility in drafting its own implementation plan where a state fails to do so. *Union Elec.*, 427 U.S. at 261, n.7.

with issues of cost and cost-effectiveness.[11] For all of the above reasons, *Union Electric* does not conflict with the lower court's holding here.[12]

The decision of the D.C. Circuit in this case furthermore does not conflict with other decisions of that court.[13] First of all, contrary to the claims of Michigan Petitioners, there is no conflict with *American Trucking Ass'ns v. Browner*, 175 F.3d 1027, *modified on reh'g*, 195 F.3d

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[11] In another Clean Air Act case presently before this Court, *American Trucking Ass'ns v. Browner*, No. 99-1426, several industry petitioners recently argued that *Union Electric* "never mentions cost-benefit analysis," and "could not be clearer that it dealt only with 'technological and economic infeasibility.' " Reply Brief for Cross-Petitioners (ATA, et al.) in No. 99-1426, at 16-17 (Oct. 6, 2000) (citation omitted).

[12] Several other opinions of this Court mentioned in passing by Industry do not support its arguments here. *See* Ind. Pet. at 16-17. First, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) was concerned with retroactive agency rulemaking under the Medicare program, and is not relevant here because EPA's NOx SIP Call Rule is not retroactive rulemaking. Nor is *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) of any assistance to Petitioners. In that case, a divided Court struck down the Secretary of Labor's proposed benzene regulations, finding that "Congress was concerned, not with absolute safety, but with the elimination of significant harm." *Id.* at 646. Indeed, the Court found that the statutory requirement that the Secretary conduct "some cost-benefit analysis" prior to setting a standard manifested the intention of Congress that the Secretary must find a "significant risk of harm." *Id.* at 644. The Court clearly did not find that the Secretary could not consider costs in setting a standard.

[13] We note that there was not a close split of D.C. Circuit judges in this case. Indeed, only a single judge would have granted the petitions for *en banc* rehearing. Ind. Pet., App. at 64a-65a.

4 (D.C. Cir. 1999), *cert. granted*, 120 S.Ct. 2003, 2193 (2000) (Nos. 99-1426, 99-1257) (*"ATA"*), or *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980) (*"Lead Industries"*). Neither *ATA* nor *Lead Industries* is relevant to the present case, as both were concerned with the promulgation of NAAQS under Section 109 of the Act, 42 U.S.C. § 7409, not the implementation of the resulting standards.[14] These two cases are part of a long line of D.C. Circuit cases that have consistently found that "[t]he statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead*

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[14] The plain language of Section 109(b)(1) makes clear that the NAAQS must be set "based on" "air quality criteria" established under Section 108, 42 U.S.C. § 7408, and must be "requisite to protect the public health." 42 U.S.C. § 7409(b)(1). The air quality criteria, in turn, "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." 42 U.S.C. § 7408(a)(2). The Act's legislative history provides clear evidence that Congress intended EPA to be limited to public health considerations when setting NAAQS. Thus, both the statute and legislative history provide that the establishment of the primary, health-based, NAAQS are confined to public health considerations. *See* Brief of Cross-Respondent American Lung Ass'n in *ATA*, No. 99-1426 (September 8, 2000). Further, Congress has ratified this long-standing interpretation of EPA's authority to establish NAAQS through repeated legislative proceedings over the past three decades in which it has considered and rejected initiatives to provide for the consideration of costs in establishing the NAAQS. *See* Brief of *Amici Curiae* Environmental Defense, American Public Health Association, *et al.* on Behalf of Cross-Respondents, in *ATA* No. 99-1426, at 5-15 (September 11, 2000).

Indus., 647 F.2d at 1148. *See also, e.g., American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982); *NRDC v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991); and *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). Because Congress has often – both explicitly and implicitly – authorized EPA to consider cost-related factors in *implementing* the NAAQS, cases such as *ATA* and *Lead Industries* dealing with the use of such factors in *promulgating* the NAAQS are simply not relevant to the issues raised by Petitioners here.[15] The various D.C. Circuit opinions addressing when EPA may take cost into consideration under different Clean Air Act provisions hardly constitute the "hodge-podge" alleged by Industry. *See* Ind. Pet. at 6. Rather, these cases divide along clear lines – EPA cannot consider costs when promulgating an air quality standard, but may, and in some cases, must, do so in implementing such a standard.[16]

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[15] *See* examples cited at footnote 9, *supra*. We also note that Michigan, *et al.*, argue that "EPA's consideration of costs under § 110(a)(2)(D) is wholly inconsistent with the position the EPA adopted before this Court in the EPA's petition for a writ of certiorari in *ATA*." Michigan Pet. at 8. But, in fact, EPA's positions in *ATA* and in this case are perfectly compatible: ATA deals with the promulgation of the NAAQS under Section 109, where consideration of costs has long and properly been excluded, while the instant case deals with the implementation of the NAAQS, where EPA's consideration of costs have often been upheld.

[16] The D.C. Circuit's opinion in *NRDC v. EPA*, 824 F.2d 1146, 1157 (D.C. Cir. 1987) (*en banc*), referenced in the Industry Petition at 7, was concerned with EPA's establishment of limits on source emissions of hazardous air pollutants under an earlier version of Section 112 of the Act, not with the promulgation of ambient air quality standards under Section 109.

The D.C. Circuit's ruling here also does not conflict with its decision in *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995) ("*Ethyl*"), as argued by Industry. Ind. Pet. at 17-18. *Ethyl* dealt with Section 211(f)(4) of the Act, 42 U.S.C. § 7545(f)(4), authorizing EPA to grant a waiver from the prohibition on the use of certain fuel additives if the manufacturer could show that the additive "will not cause or contribute to a failure of any emission device or control system . . . to achieve compliance by the vehicle with the emission standards." EPA decided that Ethyl Corporation had made the above showings, but nevertheless denied the waiver on the grounds that EPA could consider other factors such as whether the waiver was consistent with the public interest and the effects of the additive on public health. *Ethyl*, 51 F.3d at 1054-55. Noting that EPA had specifically determined that Ethyl Corporation met the explicit statutory criteria, that EPA's waiver denial was inconsistent with its published guidance and indeed that this was the first waiver case where EPA had considered factors other than those set forth in Section 211(f)(4), the D.C. Circuit held that given the plain meaning of the statute, EPA erred in considering those other factors. *Ethyl*, 51 F.3d at 1056, 1058. In this case, Section 110(a)(2)(D) does not provide a set of exclusive criteria that controls EPA's determination of the level of emissions that "significantly contribute" to downwind nonattainment and must be "adequately mitigated" under Section 110(k)(5). The use by Congress of these undefined terms permits EPA discretion in interpreting them, unlike the very explicit language in Section 211(f)(4) that the court in *Ethyl* determined provided EPA with very little discretion.

B. EPA's Consideration of Costs Under Sections 110(a)(2)(D) and 110(k)(5) Is Permissible Under Established Case Law.

This is not a case where the lower court has committed a clear error of law on an important or novel legal question. Rather, the "significant contribution" issue is easily resolved under the well-established rules of statutory construction set out in *Chevron* and its progeny. Since *Chevron,* federal courts have used a two-part test to review an agency's construction of a statute that it administers. This test is described in *Chevron* as follows:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [footnotes omitted].

Chevron, 467 U.S. at 842-43. Furthermore, in examining this second question, *Chevron* provides that the Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . . *Id.* at 844.

The issue raised by Petitioners in this case is whether EPA may consider costs in carrying out its obligations to ensure that SIPs adequately address interstate emissions

under Sections 110(a)(2)(D) and 110(k)(5) of the Act. Congress has not defined the phrase "contribute significantly" in Section 110(a)(2)(D). It has not defined when a SIP is "substantially inadequate" or when a plan will "mitigate adequately" interstate pollution transport within the meaning of Section 110(k)(5). Nor has Congress enumerated the factors that EPA must consider when determining whether a state's emissions contribute significantly to downwind nonattainment or how much emissions reduction is needed to mitigate adequately such contributions. Congress clearly has not prohibited EPA from considering cost factors in making either of these determinations. As mentioned earlier, Petitioners' inability to agree on whether and to what extent Congress did intend EPA to consider costs in requiring interstate emissions reductions pursuant to Sections 110(a)(2)(D) and 110(k)(5) of the Act speaks volumes to the lack of any clear Congressional direction on this issue. As the D.C. Circuit observed, "[a]gainst this backdrop, it would be at the very least ironic for us to say that there is 'clear congressional intent to preclude consideration of cost' under § 110(a)(2)(D)" Ind. Pet., App. at 20a (quoting *NRDC v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (*en banc*)). Because Congress has not directly addressed the precise question of whether costs may be considered under Sections 110(a)(2)(D) and 110(k)(5), EPA's resolution of that question is properly reviewed under step two of *Chevron*.

While EPA's interpretation of Sections 110(a)(2)(D) and 110(k)(5) may not be the only possible one, it is a reasonable one and therefore is permissible under *Chevron's* second step. 467 U.S. at 837. EPA considered a

variety of air-quality related factors,[17] based on the most sophisticated modeling available, in addition to the availability of cost-effective controls, in its multi-factor approach to "significant contribution." *See* 63 Fed. Reg. 57,356, 57,376-379. Cost was *not* the sole factor considered.

Furthermore, no one disputes that the failure of many areas in the Eastern United States to attain the ozone standard almost 30 years after it was first promulgated is due to contributions from both local (in-state) and upwind (out-of-state) emissions sources.[18] The basic structure of Section 110(a)(2)(D) requires EPA to include an assessment of the relative level of control efforts in the upwind and downwind states as part of its determination of whether a state's contribution is significant. Unless EPA were to interpret Section 110(a)(2)(D)(i)(I) as prohibiting *all* upwind emissions that impacted downwind nonattainment in any way (an interpretation that no party thus far has advocated in this case), EPA had to interpret the Congressional prohibition of significantly contributing emissions in such a way that, among other things, reasonably allocated responsibility between upwind and

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[17] EPA considered the following air quality factors:

"[t]he overall nature of the ozone problem . . . ;"

"the extent of the downwind nonattainment problems to which the upwind State's emissions are linked, including the ambient impact of controls required under the CAA or otherwise implemented in downwind areas;" and

"the ambient impact of the emissions from the upwind State's sources on the downwind nonattainment problems." 63 Fed. Reg. 57,356, 57,376. *See also* 62 Fed. Reg. 60,318, 60,325.

[18] *See* Ind. Pet. at 8-9; Ohio Pet. at 8.

downwind states, and among different upwind states themselves. EPA's consideration of cost in this context was a perfectly reasonable means to equitably allocate the burden of emissions reductions among the numerous states contributing to the problem.

If EPA did not consider costs and instead adopted a "bright-line" emissions contribution test as urged by some Petitioners,[19] the economic burden of compliance throughout the eastern United States could be quite disparate. Such a test could mean that a downwind state that had already adopted stringent controls would be forced to adopt even more stringent controls while upwind states could escape even basic – and much more cost-effective – controls.[20] On the other hand, if the "bright line" emissions contribution level were set low enough, the reverse could occur – that is, upwind states would bear a disproportionate share of the emissions reductions burden while downwind states would incur no responsibility. Of course, the same disparities could occur between different upwind states as well. In addressing the implications of Petitioners' arguments below, the D.C. Circuit noted that "counsel eventually went so far as to claim that if faced with two states, one of which could eliminate all relevant emissions at a trivial cost, while the other could eliminate none at a cost of less than $5000 a

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[19] *See* Ohio Pet. at 9.

[20] Indeed, EPA found that additional downwind controls would cost about $4300 per ton of NOx removed, while the regional reductions required by EPA's rule would cost only approximately $1500 per ton removed. 63 Fed. Reg. 57,356, 57,379.

ton, EPA must mandate the same cutback for each." Ind. Pet., App. at 19a.

Petitioners provide absolutely no evidence that Congress intended that EPA adopt such an approach to addressing the problem of interstate transport under Sections 110(a)(2)(D) and 110(k)(5). Rather, Congress intended quite the opposite. For example, when Congress added one predecessor to Section 110(a)(2)(D), Senate commenters noted that the new provisions were "intended to equalize the positions of the States with respect to interstate pollution," and to ameliorate previously existing "distinct economic and competitive disadvantage[s]." S. Rep. No. 95-127 at 41-42, *reprinted* in 3 1977 Leg. Hist. 1415-16. Thus, factoring cost-effectiveness into the assessment of significance allowed EPA to respond to dual directives presented it by Congress: prohibit all significant contribution, and take the equities of the situation into account in allocating responsibility for the ozone problem among different states in a region.

II. THERE ARE NO GROUNDS FOR A GRANT OF CERTIORARI ON THE NON-DELEGATION DOCTRINE QUESTION

Industry Petitioners' argument that this Court should grant certiorari to review the D.C. Circuit's decision on the State Petitioners' non-delegation doctrine challenge is meritless. Industry Petitioners fail to identify any conflict between the D.C. Circuit's ultimate decision in *Michigan* and the non-delegation jurisprudence of this Court, nor

do they identify any conflict within the D.C. Circuit's jurisprudence.[21]

A. There is No Conflict Between the D.C. Circuit's Holding and This Court's Non-Delegation Doctrine Jurisprudence.

Industry Petitioners, for the first time in this case,[22] raise their claim that EPA's analysis of significant contribution is a constitutionally-impermissible exercise by the Agency of the authority delegated to it by Congress. The D.C. Circuit determined that EPA's significant contribution analysis did not represent a constitutionally impermissible exercise of Agency discretion, and therefore did not run afoul of the nondelegation doctrine, because the Agency's assessment of significance was confined by several technical threshold determinations, and because the resulting rule was limited in its scope. Ind. Pet., App. at 27a-28a.

While Industry baldly claims that the D.C. Circuit has "turned upside-down the principle of unconstitutional delegation," they completely fail to describe any conflict between the D.C. Circuit's ultimate decision on this point and this Court's nondelegation jurisprudence. Indeed, it is Industry Petitioners (and the State Petitioners in the case below) who attempt to "turn the

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[21] Petitioners do not assert that any conflict exists between the D.C. Circuit's *Michigan* holding and decisions of any other Circuit Courts of Appeals.

[22] Industry Petitioners did not raise their nondelegation argument before the D.C. Circuit; State Petitioners did raise the issue below, but do not seek certiorari on that point.

nondelegation doctrine on its head" by using it to analyze Agency actions under delegated authority, rather than to examine the Congressional delegation of authority itself. The nondelegation doctrine consistently has been used by this Court as a constraint on Congressional, not administrative action.[23] Moreover, the Court is currently reviewing the D.C. Circuit's application of the non-delegation doctrine in the context of the Clean Air Act. *ATA*, No. 99-1257.

Assuming, *arguendo*, that it was appropriate for the D.C. Circuit to apply the nondelegation doctrine to analyze the Agency's action in issuing the NOx SIP Call, it is clear that the D.C. Circuit's *Michigan* holding is consistent with this Court's jurisprudence. This Court's nondelegation cases recognize that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The interstate transport of ozone pollution and its NOx precursor absolutely is the kind of complex technical problem for which the delegation to an agency with substantial technical and scientific expertise is appropriate.

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[23] *See e.g., Loving v. United States*, 517 U.S. 748, 771 (1996); *Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928) (the purpose of the nondelegation doctrine is to ensure that important policy choices are made by *Congress*, and that *Congress* has provided "intelligible principles" to guide agency action).

Furthermore, this Court's analysis has never ended at the question whether the delegation of authority to an agency is broad or limited – the Court looks to the overall scope of the delegated authority and the statutory context in which the rules under it are developed. Indeed, agency actions under statutes including broad delegations of authority have consistently been upheld. *Loving v. United States*, 517 U.S. 748, 771 (1996) (*citing National Broad. Co. v. United States*, 319 U.S. 190, 216-217, 225-26 (1943)). There have been only two instances in the history of the non-delegation doctrine in which this Court has struck down a Congressional delegation of authority, and in each of those cases the concern was with completely standardless or limitless delegation, not simply the grant of broad authority.[24] But EPA's decisionmaking in the NOx SIP Call was neither standardless nor limitless – the D.C. Circuit found the Agency had constrained its discretion both by the factors it used to bound its significance analysis, and by the limited geographic scope of the Rule.

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[24] *See Panama Ref. Co. v. Ryan*, 293 U.S. 388, 418, 420, 431-32 (1935); *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 537-542 & 553 (1935) (Cardozo, J. concurring and noting particular concern where the delegated authority extends "as wide as the field of industrial regulation."). And even in *Panama* and *Schecter*, the Court recognized that "legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly." *Panama*, 293 U.S. at 248; *Schecter*, 295 U.S. 495, 529-530. That is precisely the situation presented here – EPA has been delegated a complex problem to solve – a problem involving a host of technical details that Congress could not have efficiently or expertly addressed itself.

Moreover, the delegation of authority to EPA under Sections 110(a)(2)(D)(i)(I) and 110(k)(5) was specifically limited by Congress. Clear boundaries confine EPA's exercise of its discretion in the NOx SIP Call Rule, including the following recognized by the D.C. Circuit: "EPA must find (1) emissions activity within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment." Ind. Pet., App. at 28a.

The court also found that because the resulting NOx SIP Call Rule did not "affect the whole economy," a more precise set of standards confining the Agency's action was unnecessary. *Id.* Whatever else one may think of this analysis, it is completely consistent with this Court's nondelegation jurisprudence, which examines not only the standards governing agency action, but the scope of the delegated power. *See, e.g., Synar v. United States*, 626 F. Supp. 1374, 1386 (D.D.C.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986) (constitutionality of a delegation must be assessed both on the basis of the specificity of the standards governing its exercise and the overall scope of the power granted).

B. The D.C. Circuit's Holding Does Not Represent an Intra-Circuit Conflict.

Industry Petitioners paint a picture of the D.C. Circuit in conflict with itself that is simply incorrect. They allege that the *Michigan* decision is somehow at odds with the D.C. Circuit's previous decisions, particularly *ATA*.

While we disagree strongly with the D. C. Circuit's decision in *ATA*, it certainly is not in conflict with the decision in *Michigan* on the grounds asserted by Industry Petitioners.[25]

The *Michigan* court upheld the Agency's exercise of its authority under a broad delegation not only because the Agency's action was confined by articulated standards,[26] Ind. Pet., App. at 28a, but also because the

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[25] In earlier D.C. Circuit decisions upholding previous EPA significant contribution determinations under the Act, the nondelegation doctrine was not even at issue. *New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988); *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775 (D.C. Cir. 1976).

[26] This point is ignored by Industry Petitioners, who simply seize the court's *dicta* (namely the statement that the selection by EPA of the $2000/ton cost-effectiveness cutoff as one element of the significance analysis "is a radically incomplete line-drawing device") to allege an exercise of standardless discretion. Ind. Pet. at 20. But Industry Petitioners significantly fail to note that the court went on to find that EPA had properly limited its action under the statute through three threshold determinations. Ind. Pet., App. at 28a.

Furthermore, while we agree with the D.C. Circuit that EPA's NOx SIP Call Rule was a valid exercise of delegated Agency authority, we do not agree with the court's *dictum* that EPA "understood that its selection of the [cost] cut-off point was essentially unbounded." Ind. Pet., App. at 27a. EPA did not simply pick the $2000/ton figure out of thin air. Rather, it evaluated the cost of NOx emission control options, and found that most "emissions controls that are available and of comparable cost to other recently undertaken or planned NOx [controls] . . . fall below $2000/ton." 63 Fed. Reg. 57,356, 57,400. EPA further explained that "the cost-effectiveness of measures that EPA or States have adopted, or proposed to adopt, forms a good reference point for determining which of the available additional NOx control measures can most easily be

resulting Rule is limited in scope both geographically and because it does not affect all American enterprise. *Id.* at 27a-28a. Industry Petitioners erroneously suggest that this represents a new or different approach taken by the D.C. Circuit to its analysis of agency action under the nondelegation doctrine. Ind. Pet. at 20. It is notable that they provide no citations illustrating the conflict they suggest.

In fact, the court's *Michigan* analysis is completely consistent with previous cases in which the D.C. Circuit (wrongly, we believe) has used the nondelegation doctrine to analyze agency actions under Congressionally-delegated authority. In *ATA*, the court noted its view that where the Agency "standards in question affect the whole economy," a more precise delegation (or more accurately to the situation, a decisional principle more clearly articulated by the Agency) is required. *ATA*, 175 F.3d at 1037 (citing *Schecter*, 295 U.S. 495, 553 (1935)). Similarly, in *Lockout/Tagout I*, 938 F.2d at 1317 (D.C. Cir. 1991), the court remanded a rule precisely because the scope of the agency's claimed power to roam was "immense, encompassing all American enterprise," and, the D.C. Circuit believed, this ran afoul of the nondelegation doctrine. The *Michigan* court, distinguishing those earlier holdings,

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implemented by upwind states whose emissions impact downwind nonattainment problems." *Id.* This approach is analogous to various provisions in the Act requiring sources to install emission control technology that is "reasonably available." *See, e.g.*, 42 U.S.C. § 7502(c)(1) (requiring major sources in ozone nonattainment areas to install "reasonably available control technology").

held not only that the Agency had constrained its decisionmaking,[27] but that the resulting rule does not affect the whole economy. Ind. Pet., App. 28a. *Michigan* therefore does not represent a new approach by the D.C. Circuit, nor is it in conflict with its earlier decisions, and therefore is not worthy of a grant of certiorari by this Court.

More importantly, as noted *supra*, this Court currently is reviewing an important Clean Air Act case in which both the ultimate results of the D.C. Circuit's non-delegation doctrine analysis and its reasoning were inconsistent with this Court's non-delegation jurisprudence. *ATA*, No. 99-1257. That case provides this Court ample opportunity to evaluate how the D.C. Circuit is applying the non-delegation doctrine, making review of the instant case unnecessary.

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[27] In fact, the court's concern in *Lockout/Tagout I*, that the agency's asserted power to make a rule so stringent as to risk taking industry to the verge of economic ruin, *see Lockout/Tagout I*, 938 F.2d at 1317, is clearly not at issue here, where EPA has included the availability of cost-effective NOx controls as one limiting element in its significance determination.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari on the questions presented in the State and Industry Petitions.

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Nos. 00-445, 00-632, and 00-633

IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO (PROVINCE OF ONTARIO, CANADA) IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Environmental Protection Agency ("EPA") acted reasonably and in accordance with Section 110(a)(2)(D)(i)(I) of the Clean Air Act when it relied on its general rulemaking authority to consider cost-effectiveness in ascertaining the amount of emissions from upwind states which "contribute significantly" to non-attainment of ozone pollution standards in downwind states.

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STATEMENT OF THE CASE

The Province of Ontario will adopt the Statement of the Case in the Brief in Opposition filed by Respondent EPA. In addition, Ontario presents the following supplementary facts.

1. NOx EMISSIONS FROM THE UNITED STATES CAUSE INCREASED GROUND-LEVEL OZONE IN ONTARIO

The NOx SIP Call Rule upheld by the Court of Appeals for the District of Columbia Circuit in this case (63 Fed. Reg. 57,356 (Oct. 27, 1998)) will have the effect of reducing nitrogen oxide ("NOx") emissions and ground-level ozone transported within the United States and, because of prevailing winds, also transported to the United States' neighbor, the Province of Ontario, Canada.

Ontario has the largest population of any of the Canadian provinces, and the majority of the Ontario population is concentrated in the southern part of the Province, in the Great Lakes region. This region receives the most transported NOx and ozone from the United States.

Ontario and the states subject to the NOx SIP Call share a common airshed. The airshed observes no state or international boundaries. The United States contributes 91 percent of the NOx emissions to our common airshed, while Canadian sources contribute only 9 percent. J.A. 2615.

A significant portion of ground-level ozone in Ontario originates from emissions from the United States. The Ozone Transport Assessment Group ("OTAG"), which was composed of the 37 easternmost states, and industry and environmental stakeholders, modeled the transport of air pollution in North

America. OTAG's modeling shows that weather and wind patterns in the ozone season result in NOx emissions and ozone formed in the United States being transported to Ontario. J.A. 2620. In fact, 50 percent or more of Ontario's ozone problem originates in the United States. J.A. 3563.

The only locations in Ontario at which ground-level ozone consistently exceeds the 120 parts per billion level (ppb) (which is the United States one-hour ozone national ambient air quality standard ("NAAQS")), are sites in the southern part of the Province along the Great Lakes.[1/] J.A. 2621. These high ozone levels are caused by transport of ozone and its precursors from the United States across Lake Erie and Lake Huron. *Ibid.* Morever, modeling conducted by the State of Michigan shows that the Toronto/London corridor in Ontario receives significant contributions of ozone and ozone precursors from southeastern Michigan. J.A. 2672.

Ozone problems in Ontario cannot be solved without major reductions in NOx emissions from the United States. Studies by Ontario scientists have shown that NOx and volatile organic compound emissions originating in the United States can, by themselves, cause Ontario's ambient air quality criterion for ozone to be exceeded. Brief of Intervenor Respondent Her Majesty the Queen in Right of Ontario (Province of Ontario, Canada), August 27, 1999, D.C. Cir., Nos. 98-1497, *et al.*, Attachment 1, p. 5. Thus, even if all of Ontario's industries and utilities were not operating and no automobiles were being driven in Ontario, ground level ozone problems in Ontario would still exist because of transboundary pollution from the United States.

[1/] We note that Ontario's own ground-level ozone standard is more stringent at 80 ppb. J.A. 2672.

2. GROUND-LEVEL OZONE HARMS HUMAN HEALTH AND THE ENVIRONMENT IN ONTARIO

NOx emissions harm human health and cause environmental damage. NOx emissions and volatile organic compounds react in the presence of sunlight to form ground-level ozone. 63 Fed. Reg. at 57,359. There does not appear to be a "threshold level" for ground-level ozone below which no health effects are observed. J.A. 3566.

The Ontario Medical Association summarized recent research findings concerning the health effects of ground-level ozone as follows (J.A. 3565):

> In a review of available evidence for the Canadian Smog Advisory Program, two expert panels concluded that health and health-care system effects of ground-level ozone at levels that occur in Canada include lung inflammation, decreased lung function, airway hyper-reactivity, respiratory symptoms, possible increased medication use and physician/emergency room visits among individuals with heart or lung disease, reduced exercise capacity, increased hospital admissions and possible increased mortality. [footnote omitted]

Elevated levels of ground-level ozone, which occur on hot, humid days, are a major ingredient of smog. Ozone in smog has been shown to cause airway inflammation in both healthy individuals, and those who suffer from respiratory ailments such as asthma. J.A. 3553, 3568. Studies have shown that even healthy outdoor workers have a measurable decrease

in lung function when exposed to low levels of ozone. J.A. 3566. In those who suffer from asthma, elevated ozone levels cause increased frequency of asthma attacks, emergency room visits, and hospital admissions. J.A. 3568. A study in Toronto, Ontario, showed that increased ozone levels were associated with increased mortality due to respiratory disease in those who suffer from cardio-respiratory illness. J.A. 3569.

Two independent studies in Ontario show that there is a correlation between elevated ozone levels and hospital admissions for acute respiratory disease. J.A. 3574. Asthma hospital admissions for children on the day after Ontario's ozone levels had exceeded the 80 ppb standard were consistently higher than such admissions on other summer days. *Ibid.*

Children are particularly at risk from ground-level ozone and are, in fact, the largest group sensitive to ozone air pollution. Children tend to be active outdoors in the summer when ground-level ozone levels are highest. J.A. 3570. The breathing pattern of children is different from that of adults, causing them to inhale and retain greater quantities per unit body weight than adults. *Ibid.* Studies, including those conducted in Ontario, show a measurable decrease in lung function of healthy children exposed to ozone. J.A. 3570-3571. "Ozone makes asthmatics more responsive to an allergen." J.A. 3571. Further, a six-year study in Ontario found that 15 percent of summer respiratory hospital admissions for infants were pollutant-associated. J.A. 3574.

Ground-level ozone also damages the environment. EPA has found that ground-level ozone causes "significant agricultural crop yield losses" and visible damage to the foliage of many crops, trees, and ornamental plants. 63 Fed. Reg. at

57,359. Current ambient ground-level ozone levels are causing harm to forests and ecosystems. *Ibid.*

3. ONTARIO HAS MADE SUBSTANTIAL EFFORTS TO CONTROL ITS OWN NOx EMISSIONS

Ontario's air quality standard for ozone is 80 ppb (one-hour average) (J.A. 2672), which is more stringent than the United States' one-hour ozone standard of 120 ppb. In a June 2000 agreement among the federal, provincial, and territorial governments of Canada, Ontario agreed to a Canada-Wide Standard of 65 ppb (eight-hour average) air quality standard for ozone to be achieved by 2010.[2/]

Ontario's emissions of NOx for 1998, the most recent year for which data are available, were less than 1990 levels by 17.4 percent.[3/]

Ontario has also set a goal to reduce projected emissions of NOx by 25 percent from 1990 levels by 2005.[4/] As just stated, by 1998, Ontario had already achieved a 17.4 percent reduction in NOx emissions from 1990 levels. By comparison, Ontario scientists expect the NOx SIP Call Rule to reduce NOx emissions in the covered states by approximately 25 percent on average from 1990 levels by 2007. See 63 Fed. Reg. at 57,450.[5/] Ontario has further pledged to achieve a 45 percent reduction in NOx emissions from 1990 levels by 2015.

[2/] See http://www.ec.gc.ca/special/aqa_2000_e.pdf.

[3/] See http://www.ene.gov.on.ca/envision/news/factnoxvoc.htm.

[4/] See http://www.ene.gov.on.ca/envision/news/00600MB.html.

[5/] See http://www.ec.gc.ca/special/aqa_2000_e.pdf.

Under the NOx SIP Call Rule, the states are free to choose their own methods of meeting the requirements of the Rule. See 63 Fed. Reg. at 57,358-57,359. Ontario understands that most NOx emissions reductions in the midwestern states will come from the electrical generating sector.[6/] The average rate of NOx emissions per megawatt hour ("MWH") of electricity produced in 1996 was 2.6 pounds for the northeastern states and 6.6 pounds for the midwestern states. J.A. 2650. Since the record closed below, NOx emissions data for 1998 have become available. The 1998 data show that Ontario's electricity sector emits less than one (1) pound of NOx per megawatt hour of electricity produced.[7/] In 1998, Ontario emitted less NOx per megawatt hour of electricity produced than the States of Michigan (3.85 lbs./MWH), Ohio (4.71 lbs./MWH), Indiana (5.46 lbs./MWH), Illinois (3.43 lbs./MWH), and even New York (1.67 lbs./MWH). In 1998, Ontario emitted less than a pound (0.96 lbs.) of NOx per megawatt hour of electricity produced. *Ibid.*

Ontario's total NOx emissions from electrical generation in 1998 were also significantly less than emissions from the electricity sector in each of the five states just mentioned. In comparison to Ohio, Ontario's NOx emissions are less by a factor of 5.7; in comparison to Michigan, Ontario's emissions are less by a factor of 3.2; in comparison to Indiana, Ontario's emissions are less by a factor of 5.2; in comparison to Illinois, Ontario's emissions are less by a factor

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[6/]We note that petitioners Appalachian Power Company, *et al.*, are comprised almost exclusively of electrical power companies. See Petition for a Writ of Certiorari, October Term 2000, No. 00-445, "Disclosure Statement," pp. x-xiii.

[7/]See data summarized at http://www.ene.gov.on.ca.envision/news/3charts2.pdf. The website reports emissions in kilograms. One kilogram is approximately 2.2 pounds.

of 3.9; and in comparison to New York, Ontario's emissions are less by a factor of 1.4. *Ibid.*

Thus, the most recent data available show that Ontario's NOx emissions are less than emissions from each of the five states discussed above per megawatt hour of electricity produced and less than the identified states on an absolute basis. Nonetheless, Ontario has also committed to adopt the EPA standards for fossil-fueled electricity generating plants when they are implemented, if their adoption will result in lower emissions in Ontario.[8/]

Since 50 percent of Ontario's ozone originates in the United States, controls on NOx emissions from the midwestern states are critical in order for Ontario to improve its air quality with respect to smog. Thus, Ontario strongly supports EPA's NOx SIP Call Rule, which will result in reduced NOx emissions being transported as NOx and ozone to Ontario, as part of an overall program to reduce ground-level ozone and smog in Ontario.

The control of air pollution emissions in an airshed which extends beyond state and international boundaries poses extremely complex regulatory issues. Ontario had observer status with OTAG, and scientists with Ontario's Ministry of the Environment have analyzed the technical basis of EPA's NOx SIP Call Rule, which was based closely on the work of OTAG. Ontario's scientists have concluded that the Rule is the result of comprehensive scientific analysis of an extremely complex air pollution problem and that it reflects sound policy choices. Ontario submits that the NOx SIP Call Rule will lead to cleaner air in both the United States and Ontario, Canada, and should be allowed to take effect.

[8/]See http://www.ene.gov.on.ca/envision/news/01400mb.html.

REASONS FOR DENYING THE WRIT

THE PETITIONS SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS DECISION

Section 109 of the Clean Air Act requires the Administrator of the Environmental Protection Agency ("EPA") to set National Ambient Air Quality Standards ("NAAQS") for air pollutants in order to protect human health and welfare. 42 U.S.C. 7409. Section 110(a) of the Act provides that, after EPA promulgates these NAAQS, each state is required to prepare a State Implementation Plan ("SIP") which implements the NAAQS. 42 U.S.C. 7410(a). The SIP is reviewed by EPA under Section 110. 42 U.S.C. 7410. Section 110(a)(2) of the Act sets forth criteria that a SIP must satisfy and provides that, if these criteria are met, EPA must approve the proposed plan. 42 U.S.C. 7410(a)(2).

Section 110(k)(5) of the Act provides that, once EPA determines that the "implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport * * * or to otherwise comply with any requirement of this chapter * * *," EPA must issue a rule ("SIP Call") that orders the state to revise and correct its SIP as necessary. 42 U.S.C. 7410(k)(5). Section 307(d) of the Act requires EPA, in issuing a SIP Call under Section 110(k)(5) of the Act, to adhere to its rulemaking procedures, including a formal notice and comment procedure. Section 307(d), 42 U.S.C. 7607(d).

a. The Decision Below Does Not Conflict with This Court's Decision in *Union Electric v. EPA*

In *Union Electric v. EPA*, 427 U.S. 246, 256 (1976), in considering the requirements for SIP's under Section 110(a)(2) of the Clean Air Act, this Court held:

> After surveying the relevant provisions of the Clean Air Amendments of 1970 and their legislative history, we agree that Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a state implementation plan.

The court of appeals concluded in this case that "[i]n sum, there is nothing in the text, structure, or history of Section 110(a)(2)(D) that bars EPA from considering cost in its application." 213 F.3d at 679. Petitioners Michigan, Alabama, West Virginia, South Carolina, and Virginia (hereafter "Michigan") argue that the decision below conflicts with *Union Electric* because, "in the absence of congressional intent, economic and technological infeasibility shall not be considered by the EPA under section 110(a)(2)." Petition for a Writ of Certiorari, Oct. Term 2000, No. 00-632 (hereafter "Mich. Pet."), p. 14.[2/]

[2/] Michigan is the only petitioner who argues that EPA should be precluded from using cost in Section 110(a)(2). *See* Petition for a Writ of Certiorari, Oct. Term 2000, No. 00-633 of the States of Ohio and Indiana (hereafter "Ohio Pet."), p. 15 ("we argue that considerations of cost-effectiveness should be a secondary factor to * * * air-quality factors under Section 110"); Petition for a Writ of Certiorari, Oct. Term 2000, No. 00-445 of the Appalachian Power Company, *et al.*, p. 12 ("Industry Petitioners do not question that cost is to play a key role in the implementation of the CAA in general and the implementation of the interstate pollutant transport

There is no conflict between *Union Electric* and the decision below.[10/] Michigan incorrectly concludes that "if the EPA was barred from reading cost considerations into the original section 110(a)(2)(E) when approving SIP's, it also must be barred from injecting cost considerations into today's section 110(a)(2)(D)." Mich. Pet. 16. Michigan attempts to extend broadly the *Union Electric* holding to cover any EPA action that relates to Section 110(a)(2) in an attempt to establish a conflict. Michigan's attempt to extend the Court's holding is unpersuasive because both the function that EPA is performing and the issues that are involved in this case are completely different from those in *Union Electric*.

In *Union Electric*, this Court was called upon to examine EPA's approval of a SIP under Section 110(a)(2) of the Act. The Court examined Section 110(a)(2) to decide "whether the operator of a regulated emission source, in a petition for review of an EPA-approved state plan filed after the original 30-day appeal period, can raise the claim that it is economically or technologically infeasible to comply with the plan." 427 U.S. at 249. The Court concluded, based on the "relevant provisions of the Clean Air Act amendments of 1970 and their legislative history," that EPA could not consider claims of economic or technological infeasibility when it reviewed a plan. 427 U.S. at 256. Thus, *Union Electric* addressed only whether a state's SIP met the criteria of Section 110(a)(2).

The present case involves EPA rulemaking under Section 110(k)(5) of the Act, rather than EPA's consideration of a SIP under Section 110(a)(2). Consistent with its

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provisions in particular").

[10/] Significantly, Michigan did not even rely on *Union Electric* in its opening or reply briefs in the court of appeals.

rulemaking authority, EPA first issued a notice of proposed rulemaking that found that emissions from 22 states and the District of Columbia "significantly contribute" to downwind air pollution problems. 62 Fed. Reg. 60,318 (Nov. 7, 1997). EPA required these states to revise their SIP's to "contain adequate provisions" to prevent the emission of pollutants that contribute significantly to the noncompliance of NAAQS's in other states. *Ibid.* The rule proposed that each state was required to eliminate the NOx emission that could be reduced by highly cost-effective measures. *Ibid.* After an extensive notice and comment period, including the issuance of revised and supplemental public notices, EPA issued the final rule on October 27, 1998. 63 Fed. Reg. at 57,356. As the court of appeals noted, "the fundamental dispute [in this case] is over the clarity of the phrase 'contribute significantly'" in Section 110(a)(2)(D) and how it was defined by EPA in its final rule. 213 F.3d at 679.

Michigan's challenge is not affected by the *Union Electric* holding that EPA cannot consider claims of economic and technological infeasibility when it reviews SIP's. The approval or rejection of SIP's involves an entirely different function and is performed under an entirely different statutory provision than the issuance of a SIP call, such as is involved in this case.

Morever, while EPA considered cost in promulgating the NOx SIP Call Rule, it did not consider any claim of "technological or economic infeasibility." To the contrary, the types of emission control relied upon by EPA in making its determinations in the rule-making were economically and technically feasible. In fact, EPA found them to be "highly cost-effective." 63 Fed. Reg. at 57, 377. Thus, the cost issues in the two cases are entirely different.

b. The Decision Below Does Not Conflict with Prior Decisions of the District of Columbia Circuit

Michigan further asserts that the decision of the Court of Appeals for the District of Columbia Circuit conflicts with its prior decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), and its recent decision in *American Trucking Ass'ns Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). Mich. Pet. 19. However, both of those cases involved Section 109 of the Act, not Section 110, which is the section at issue here. The Clean Air Act is a highly complex statute. The fact that in analyzing the statute, the court of appeals concluded that costs may not be considered in setting NAAQS under Section 109, but may be considered in implementing Section 110, creates no conflict among decisions of the Court of Appeals for the District of Columbia Circuit.

In *Lead Industries* and *American Trucking*, which were decided nearly 20 years apart, the court of appeals concluded, based on the plain language of the "statute and its legislative history[,] * * * [that] economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead Industries Ass'n v. EPA, supra,* 647 F.2d at 1148; *accord American Trucking Ass'ns Inc. v. EPA, supra,* 175 F.3d at 1040 ("As this court long ago made clear, in setting NAAQS under §109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards" (citing *Lead Industries* and other cases)).

Section 109(b)(1) of the Act, 42 U.S.C. 7409(b)(1), requires EPA to set national ambient air quality standards "which[,] in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite

to protect the public health." That statutory provision is not at issue in this case. Therefore, the court of appeals' conclusions that the statutory language of Section 109, along with its legislative history (*Lead Industries Ass'n v. EPA, supra*, 647 F.2d at 1149-1150), preclude EPA from considering costs in setting NAAQS, is irrelevant to the statutory interpretation of Section 110 of the Act, which is at issue here. Michigan can point to no statutory language or legislative history which would prohibit EPA from considering costs under Section 110(a)(2)(D)(i)(I) of the Act.

In attempting to show a conflict between the decision here and *Lead Industries*, Michigan asserts that, in *Lead Industries*, the court "reviewed Section 110" and stated that, "if Congress had wanted the economics of pollution control considered[,] it would have so provided in Section 110." Mich. Pet. 20, citing *Lead Industries*, 647 F.2d at 1149, n. 37. However, this statement in a footnote does not show any conflict between *Lead Industries* and the decision here.

First, the footnote is dictum. Section 110 of the Clean Air Act was not under consideration by the Court in *Lead Industries*.

Second, even if the footnote were not dictum, taken in context, it does not conflict with the decision below. In relevant part, the footnote states (647 F.2d at 1149, n. 37):

> Similarly, § 110, 42 U.S.C. 7410, provides that once ambient air quality standards have been promulgated, each state must prepare and submit an implementation plan outlining the measures to be taken to ensure that the standards are met. It is these state

> implementation plans which actually impose pollution control requirements and, consequently, if Congress had wanted the economics of pollution control considered it would have so provided in § 110. While states may consider economic and technological feasibility in selecting the mix of control devices, they may do so only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards. Section 110(a)(2), 42 U.S.C. 7410(a)(2). [emphasis added]

Michigan's citation of the footnote from *Lead Industries* omits the last sentence, which is emphasized above. This sentence is obviously critical. The court of appeals explicitly stated that under Section 110, "states may consider economic and technological feasibility in selecting the mix of control devices * * * only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards." 647 F.2d at 1149, n. 37.

In this case, the strict deadlines for attainment of the NAAQS requirement for ozone have not been met. 63 Fed. Reg. at 57,446-57,447 (1998). EPA issued the NOx SIP Call Rule because the states had failed in their existing SIP's to control adequately NOx emissions which prevent attainment of the ozone NAAQS in downwind states. Thus, the very purpose of the NOx SIP Call Rule is to ensure compliance with the ozone NAAQS. Here, EPA's use of cost considerations was not in setting ambient air quality standards, but in determining how the standards will be implemented.

There is nothing in *Lead Industries* to support Michigan's view that, after EPA has identified the states whose NOx emissions are harming other states, EPA may not use cost considerations in setting the level of controls to be applied. EPA has concluded that applying the level of controls called for in the NOx SIP Call Rule will have an "appreciable impact" on downwind nonattainment, and that the required reductions in NOx emissions are not "more than is necessary to ameliorate downwind nonattainment." 63 Fed. Reg. 57, 403, 57,446-57,447 (1998). EPA's actions under Section 110 in this case are therefore consistent with the dictum in *Lead Industries*.

Michigan makes no claim that the *American Trucking* case even discusses Section 110 of the Clean Air Act. Mich. Pet. 19-21. Instead, Michigan alleges that a conflict exists because the court of appeals held that EPA may not consider costs in setting standards to protect public health and welfare under Section 109(d) of the Act in *American Trucking*, but that it may consider costs in the context of Section 110 in this case. Mich. Pet. 19-20. However, as we have seen, in *Lead Industries*, *supra*, 647 F.2d at 1149-1150, which has been consistently followed in the District of Columbia Circuit, the court of appeals based its conclusion that costs may not be considered in setting NAAQS under Section 109 on the statute's plain language and legislative history. Michigan makes no showing that Section 110's plain language and legislative history compel the same result. Therefore, no conflict exists between this case under Section 110 and *Lead Industries* and *American Trucking* under Section 109.

In any event, a conflict of decisions within a Circuit, even if it existed, would be no basis for granting a writ of certiorari. Such conflicts can be corrected by rehearings *en banc* within the Circuit. Petitioners, in fact, asked for rehearing

en banc, but did not rely on the alleged intra-circuit conflict. There is certainly no reason for a writ of certiorari to be granted on this basis.

c. EPA's Rule Does Not Conflict with State Sovereignty or the Act's Statutory Framework of Cooperative Federalism as Interpreted by This Court in *Train v. NRDC*

The Michigan and Ohio petitioners also argue broadly that EPA intruded on state sovereignty and cooperative federalism when it issued the NOx budget program in its Final Rule. Mich. Pet. 22; Ohio Pet. 9.

Michigan and Ohio claim that state sovereignty and cooperative federalism are offended because the NOx SIP Call Rule may cause a state, which contributes less to a particular area's ozone nonattainment than another state, to have to reduce more NOx emissions than the state which has contributed more. Michigan and Ohio use the example that Indiana contributes less than Pennsylvania to New York City's ozone nonattainment. Mich. Pet. 22-23; Ohio Pet. 12-13. Indiana, whose NOx emitters have not applied the same level of pollution control devices to their smokestacks as have Pennsylvania's emitters, will be able to achieve more highly cost-effective reductions in NOx emissions than Pennsylvania. Thus, under the budget set by EPA in the Rule, Indiana will be required to reduce its NOx emissions more than Pennsylvania.

Michigan and Ohio argue that this effect on Indiana offends state sovereignty and the system of cooperative federalism set forth by Congress in the Clean Air Act. Since Pennsylvania contributes more to New York City's nonattainment than does Indiana, Michigan and Ohio argue that

Pennsylvania should be required to reduce its emissions more. Mich. Pet. 24-25; Ohio Pet. 12-13. Michigan bases its argument on Section 110(k)(5) of the Act, 42 U.S.C. 7410(k)(5), which requires that once EPA has concluded that a SIP is inadequate, "the Administrator shall require the State as necessary to correct such inadequacies." Mich. Pet. 24. Michigan asserts that EPA's regulatory choices are "illogical" because, under the budgets set in the NOx SIP Call Rule with respect to New York City, Indiana will be controlling more NOx than is "necessary" and Pennsylvania will be controlling less NOx than is "necessary." *Ibid.*

Although Michigan and Ohio cast their argument as one of state sovereignty and cooperative federalism, it is really an argument concerning the wisdom of EPA's regulatory approach. In addressing the complicated problem of interstate ozone transport, where each state's NOx emissions have effects on the attainment of ozone air quality standards in numerous other states, it was appropriate for EPA to make the determination of the amount of NOx emissions from a state which "contribute significantly" and are necessary to be reduced to correct the inadequacy of the state's SIP. Under *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 845 (1984), the courts may not substitute their judgment for that of the agency, but must determine "whether the Administrator's view that [the regulatory choice] is appropriate in the context of this particular program is a reasonable one." The court of appeals properly concluded here that it had "no basis to upset EPA's judgment." 213 F.3d at 680.

The well-established law concerning the federal-state division of responsibilities under the Clean Air Act shows that EPA has acted fully within that authority in issuing the NOx SIP Call Rule. In *Train v. NRDC*, 421 U.S. 60, 79 (1975), this

Court recognized that EPA is "plainly charged by the Act with responsibility for setting the national ambient air standards," but was "relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations." The Court further stated that "so long as the ultimate effect of a State's choice of limitation is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Ibid.* This is exactly what EPA has allowed states to do in the NOx SIP Call Rule.

EPA made clear that a state could use any emissions control measure it wanted to achieve the NOx budget requirement. *See* Final Rule, 63 Fed. Reg. at 57,368. Under the budget plan, a state "may choose from a broader menu of cost-effective, reasonable alternatives" including alternatives that "may even be more advantageous in light of local concerns." *Id.*, pp. 57,369-57,370. Furthermore, EPA stated that the states have "full discretion in selecting the controls, so that [the states] may choose any set of controls that would assure achievement of the budget." *Id.*, p. 57, 378. Finally, each state has the option to adopt an interstate trading program that allows it to purchase NOx "allowances" from sources that have elected to over-control, as well as the option, under certain circumstances, of "banking" allowances from prior years so that it can meet emissions limits. *Id.*, p. 57,430. Thus, EPA allowed the states substantial discretion in carrying out their responsibilities under the Act.

Michigan argues in conclusion that certiorari should be granted because, in its view, there are other ways to improve public heath and the nation's air quality than those to be implemented under the NOx SIP Call Rule. Mich. Pet. 28.

Michigan is making a policy argument. This Court has made clear that such arguments must be addressed to Congress or to the agency, and not to the courts (*Chevron v. NRDC, supra,* 467 U.S. at 865):

> In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. [footnotes omitted]

This is exactly the situation presented here and concerns the same statute the Court considered in *Chevron v. NRDC, supra.* The petitioners have presented no grounds for a grant of certiorari.

* * *

Ontario and the majority of the states subject to the NOx SIP Call Rule share a common airshed. Because of geography, chemistry, and weather, Ontario is directly affected by NOx emissions and ozone transported from the subject states. While no government can change geography, chemistry or weather, governments can work together to reduce emissions of NOx into our common airshed and protect health and the environment. The NOx SIP Call Rule is an important step for such purposes. The Rule reflects sound and sensible policy choices designed to ameliorate a complex air pollution problem. Ontario strongly supports the Rule before this Court.

CONCLUSION

For these reasons, and for those set forth by the other respondents, Ontario respectfully submits that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Nos. 00-445, 00-632 and 00-633

In the Supreme Court of the United States

APPALACHIAN POWER COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

STATES OF OHIO AND INDIANA, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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8 1 PR

QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency, in promulgating a final rule respecting implementation of a National Ambient Air Quality Standard under the Clean Air Act, 42 U.S.C. 7401 *et seq.*, reasonably determined that it may consider the cost-effectiveness of available pollution controls as a factor in identifying "upwind" State air pollution emissions that "contribute significantly" to nonattainment of the standard in "downwind" States.

2. Whether the court of appeals properly determined that the Environmental Protection Agency's authority under the relevant provisions of the Clean Air Act is sufficiently defined to satisfy the nondelegation doctrine.

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In the Supreme Court of the United States

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a)[1] is reported at 213 F.3d 663.

[1] This brief responds to three petitions for certiorari filed in this case: (1) *Appalachian Power Co.* v. *EPA*, No. 00-445 (filed Sept. 20, 2000) (APC Pet.); *Michigan* v. *EPA*, No. 00-632 (filed Oct.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. Petitions for rehearing were denied on June 22, 2000 (Pet. App. 62a-65a). The petition in No. 00-445 was filed on September 20, 2000. The Chief Justice extended the time for the States to file their petitions for a writ of certiorari to and including October 20, 2000, and the petitions in Nos. 00-632 and 00-633 were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a decision of the court of appeals arising from an Environmental Protection Agency (EPA) rulemaking under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.* The CAA, among other things, directs EPA to develop National Ambient Air Quality Standards (NAAQS) and encourages States to implement the NAAQS through State Implementation Plans (SIPs). 42 U.S.C. 7410. EPA promulgated a rule, known as the "NOx SIP Call," that required the SIPs of 22 States and the District of Columbia to be revised to mitigate the interstate transportation of ozone. See 63 Fed. Reg. 57,356 (1998). Numerous petitioners challenged EPA's rule through consolidated petitions for review, and the court of appeals granted the petition in part, but largely rejected petitioners' objections to the rule. See Pet. App. 1a-61a.

1. The NOx SIP Call requires certain States (in order for their SIPs to remain acceptable under the Act) to develop plans to reduce emissions of ozone

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20, 2000) (Michigan Pet.); and *Ohio & Indiana* v. *EPA*, No. 00-633 (filed Oct. 20, 2000) (Ohio Pet.). For convenience, all citations to "Pet. App." refer to APC's petition appendix.

precursor air pollutants that contribute significantly to nonattainment of the NAAQS for ozone in "downwind" States. See generally 63 Fed. Reg. at 57,356. Ground-level ozone, which causes adverse health effects, is created from the chemical reactions of precursor pollutants in sunlight. *Id.* at 57,359. For nearly two decades, scientists have accumulated evidence that the wind-borne movement of nitrogen oxides (NOx) and other ozone precursors, often over long distances, contributes to serious downwind ozone problems, most notably in many of the major eastern urban centers. *Ibid.* The NOx SIP Call represents the culmination of a multi-year effort by Congress, EPA, and the States to develop solutions to that chronic interstate ozone pollution problem. See Pet. App. 8a-12a.

2. The CAA makes "the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). EPA is authorized to set NAAQS for air pollutants at levels requisite to protect public health and welfare. 42 U.S.C. 7409. EPA has established NAAQS for several pollutants, including ozone. 40 C.F.R. 50.9, 50.10. Once EPA promulgates a NAAQS, each State's SIP must provide for its implementation, maintenance and enforcement. 42 U.S.C. 7410(a). If the Administrator of EPA finds that an approved SIP is "substantially inadequate" to attain or maintain the NAAQS, mitigate adequately "interstate pollutant transport," or otherwise comply with the CAA, she is authorized to "require the State to revise the plan as necessary to correct such inadequacies" (*i.e.*, issue a "SIP Call"). 42 U.S.C. 7410(k)(5). Section 110(a)(2)(D) of the CAA, 42 U.S.C. 7410(a)(2)(D), sometimes referred to as the "good neighbor" provision, requires that all SIPs, *inter alia*, prohibit emissions of air pollutants

in amounts that would "contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any * * * [NAAQS]."

3. On November 7, 1997, EPA issued a notice of proposed rulemaking for the NOx SIP Call, finding that 22 States and the District of Columbia (for convenience, the "23 States") significantly contribute to nonattainment of the ozone standard in downwind areas within the meaning of the CAA's good neighbor provision. 62 Fed. Reg. 60,318, 60,320 (1997).[2] At the same time, EPA proposed to require each of the 23 States to revise its SIP to demonstrate that total emissions, within each State, of NOx—the most significant ozone precursor responsible for ozone transported to other States—would be reduced by the amounts determined to be significant and, therefore, would not exceed an assigned NOx emissions "budget" established by EPA. *Ibid.* EPA published the final rule on October 27, 1998. 63 Fed. Reg. at 57,356. Like the proposal, the final rule determined that the 23 States contribute significantly to downwind ozone nonattainment and required each of those States to submit SIP revisions containing control measures sufficient to meet the State's NOx budget. 40 C.F.R. 51.121(e)(1).

4. The final rule was premised, first and foremost, on state-of-the-art computer modeling of air quality, showing which upwind States were, in fact, substantial enough contributors to nonattainment of the "1-hour"

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[2] The 23 States were Alabama, Connecticut, Delaware, the District of Columbia, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin. 62 Fed. Reg. at 60,320.

ozone standard in downwind areas to warrant inclusion in the SIP Call.[3] For the proposal, EPA relied heavily on modeling performed between 1995 and 1997 by the Ozone Transport Assessment Group (OTAG), a work-group with representatives from States, industry, environmental organizations, and EPA. See Pet. App. 12a-13a. In response to comments arguing that the OTAG modeling utilized for the proposal was not specific enough, EPA conducted additional, state-specific air-quality modeling using two different modeling techniques. *Id.* at 13a. From that modeling, EPA compiled detailed data summaries showing the magnitude, frequency, and relative amount of each upwind State's emissions contributions to each downwind nonattainment problem being studied. *Id.* at 16a. That additional air quality analysis, fully documented in the record for the final rule, confirmed EPA's proposed "significant contribution" finding as to the 23 States. *Id.* at 13a; 63 Fed. Reg. at 57,384. As the court of appeals correctly noted, in the course of the present litigation, "no one quarrel[ed] either with [EPA's] use of multiple measures, or with the way it drew the line at this stage." Pet. App. 16a.

5. EPA then examined the cost-effectiveness of available emissions controls in each of the 23 upwind

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[3] In the final rule, EPA also independently analyzed the need for the SIP Call under an "8-hour" ozone standard that EPA issued in 1997. See generally Pet. App. 6a-7a. However, in light of the ongoing challenge to the 8-hour ozone standard in *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027, reh'g granted in part and denied in part, 195 F.3d 4 (D.C. Cir. 1999), cert. granted, 120 S. Ct. 2003, 2193 (2000) (*ATA*), EPA stayed the findings for the SIP Call under the 8-hour standard, and the court of appeals accordingly limited its review to the support for the SIP Call under the 1-hour standard. Pet. App. 7a-8a.

States as part of its analysis in determining the amount of the State's emissions that were considered to "contribute significantly" to downwind nonattainment, as well as the corresponding emission reductions that were needed to eliminate the significant contribution. The remaining emissions became each of those States' "NOx budgets," *i.e.*, the maximum amount of NOx emissions expected after the States implement controls necessary to eliminate the "significantly contributing" emissions. Pet. App. 16a-17a. In effect, EPA set each State's NOx budget to reflect the amount of "highly cost-effective" NOx emissions reductions EPA believed would be available in that State. *Id.* at 17a; 63 Fed. Reg. at 57,377-57,378, 57,399-57,403. For purposes of that analysis, which included review of extensive emissions control data, EPA determined that "highly cost-effective" NOx emissions reductions are those that cost no more than $2,000 per ton of NOx reduced. Pet. App. 17a. EPA emphasized, however, that, in developing SIP revisions to meet the NOx budgets, States would be free to rely on any NOx emission control measures they deemed appropriate, whether or not they were the same controls assumed by EPA in developing the budgets. *Id.* at 42a; 63 Fed. Reg. at 57,369-57,370, 57,378.

EPA tested the efficacy of the proposed NOx emissions budgets through further rounds of air quality modeling. First, it conducted additional computer modeling to ensure that the budgets would produce appropriate downwind air quality improvements. See 63 Fed. Reg. at 57,379. That modeling confirmed that the required reductions would, in fact, allow downwind ozone nonattainment areas to make "appreciable progress towards attainment" and would not result in any instances of "overkill," *i.e.*, upwind emissions reductions

that "are more than necessary to ameliorate downwind nonattainment in every downwind area affected by that upwind State." *Ibid.* EPA also compared the air quality and cost impacts of its proposed approach to alternative approaches premised, for example, on "varying levels of controls in different parts of the 23 jurisdictions." *Id.* at 57,423. EPA concluded, however, that none of those alternatives would "provide either a significant improvement in air quality or a substantial reduction in cost." Pet. App. 26a (quoting 63 Fed. Reg. at 57,423). The court of appeals noted that petitioners "offer[ed] no material critique of EPA's methodology in reaching this answer." Pet. App. 26a.

6. Various States and industry groups challenged the NOx SIP Call through consolidated petitions for review in the court of appeals. Other States, industry groups, and environmental groups intervened in support of the rule. The petitions raised myriad issues, including the two issues that provide the basis for the petitions for writ of certiorari: (1) whether cost-effectiveness of emissions controls may be considered in determining what level of emissions contributions are "significant"; and (2) whether the CAA or EPA's interpretations of its provisions are so undefined as to violate the nondelegation doctrine. The court denied all of the petitions for review on those and other major issues. Pet. App. 1a-56a. It vacated, however, certain relatively minor aspects of the rule, which are not at issue here.[4] Judge Sentelle dissented. He concluded

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[4] On the basis of certain discrete record issues, the court of appeals vacated the SIP Call as it applied to Wisconsin, Missouri, and Georgia. The court also remanded the rule for EPA to reconsider issues respecting the definition of an electric generating unit and a change in the control level assumed for large stationary internal combustion engines. Pet. App. 56a.

that the relevant provisions of the CAA do not allow EPA to consider cost of controls at all, and he would have vacated the entire rule on that basis. *Id.* at 57a-61a. Petitioners sought rehearing and rehearing en banc, primarily on the grounds articulated in the dissent, but the court of appeals denied those petitions. *Id.* at 62a-65a. Judge Sentelle would have granted the petitions. *Ibid.*

ARGUMENT

The court of appeals correctly ruled that EPA may consider the cost-effectiveness of pollution controls in determining which emissions contribute significantly to nonattainment of the ozone standard in downwind areas. That statutory ruling is correct, does not conflict with any decision of this Court or any other court of appeals, and accordingly does not warrant review by this Court. The court of appeals also was correct in holding that neither the relevant provisions of the CAA nor EPA's actions violate the nondelegation doctrine. While the court of appeals' analysis was premised, in part, on a decision of that court that the federal government has challenged in *Browner* v. *American Trucking Associations* (*ATA*), No. 99-1257 (argued Nov. 7, 2000), the judgment reached by the court of appeals is correct and does not warrant further review, regardless of this Court's decision in *ATA*.[5]

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[5] APC and Ohio suggest that the Court may wish to defer action on their petitions pending a decision in *ATA*. APC Pet. i n.*; Ohio Pet. 16 n.8. That action is not warranted as to either the nondelegation issue or the cost issue in this case. The court of appeals adopted a novel nondelegation standard in *ATA*, *supra*, at 1027, and the federal government has challenged that ruling in *Browner* v. *ATA*, No. 99-1257. The court of appeals in this case, however, has rejected petitioners' nondelegation argument, even

1. The NOx SIP Call is EPA's effort to implement the CAA provisions that address an interstate problem —the accumulation of ozone, which, for example, blankets the northeastern United States on warm summer days as a result of air pollution emitted by numerous sources in nearly two dozen States east of the Mississippi River. EPA identified, through sophisticated air quality modeling, those States that contribute to that problem, and it then identified as "significant contributions" those emissions in excess of what the emission levels would be if all of the contributing States imposed the same level of highly cost-effective emission controls on their sources.

As we have explained in *ATA* v. *Browner*, No. 99-1426, the Clean Air Act prohibits consideration of the projected cost of pollution controls when establishing NAAQS, but generally allows those costs to be considered at the implementation stage. See Br. for Fed. Resp'ts at 5-7, 17-31, 45-47, *ATA* v. *Browner*, *supra*. In accordance with that overall statutory structure, EPA has reasonably construed the relevant provisions of the Act—Section 110(a)(2)(D) and

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under its *ATA* ruling. Pet. App. 26a-28a. The relevant provisions of the CAA would satisfy nondelegation requirements under any plausible standard. See pp. 20-22, *infra*. The cross-petitioners in *ATA* v. *Browner*, No. 99-1426, contend that the CAA requires EPA to consider the costs of pollution control when setting NAAQS. Petitioners in this case contend, however, that the CAA precludes EPA from considering those costs when determining how to implement the CAA's trans-boundary pollution provisions set out in Section 110(a)(2)(D), 42 U.S.C. 7410(a)(2)(D). If the cross-petitioners in *ATA* prevail on their cost issue, that result would weaken, rather than bolster, petitioners' cost argument in this case. And if the *ATA* cross-petitioners do not prevail on their cost issue, that result would preserve the state of the law that provided the basis for the court of appeals' decision in this case.

(k)(5)—to allow consideration of cost-effectiveness of controls in determining which contributions to the interstate ozone problem are "significant[]" for purposes of the NOx SIP Call. See 42 U.S.C. 7410(a)(2)(D) and (k)(5). The court of appeals properly upheld EPA's determination. Petitioners' challenges rely heavily on mistaken characterizations of the manner in which EPA considered costs in the rulemaking. Because the court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals, petitioners' challenge to EPA's construction of the relevant provisions of the CAA presents no issue warranting this Court's review.

a. The petitions for writ of certiorari rest largely on the mistaken assertion that the NOx SIP Call "rel[ies] on cost-effectiveness, to the exclusion of air quality effects, in assessing whether one state's emissions contribute 'significantly' to another state's ozone nonattainment air quality." APC Pet. 14; see also, *e.g.*, Michigan Pet. 12; Ohio Pet. 5-6. To the contrary, EPA focused on air quality—not cost—as the principal basis for determining which States have total emissions with sufficient impacts on downwind ozone nonattainment to warrant inclusion in the SIP Call. EPA's determinations were premised on state-specific, multi-dimensional, air-quality modeling analyses that were fully documented in the administrative record and mostly unchallenged in this case. See pp. 4-7, *supra*; Pet. App. 12a-14a, 16a; 63 Fed. Reg. at 57,384, 57,387-57,398.[6]

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[6] That modeling allowed EPA to make careful, air-quality-based distinctions among all upwind States whose emissions could potentially impact a particular downwind area. In many instances, EPA determined that the ambient impacts downwind from a particular upwind State's emissions were so small as to not be "significant" with regard to particular downwind nonattainment pro-

As the court of appeals correctly recognized, only after those determinations were made did EPA examine the amount of highly cost-effective NOx emissions reductions available to develop the NOx budgets. Pet. App. 16a-17a; see also 63 Fed. Reg. at 57,377-57,378. That analysis was the principal factor only in determining the *subset* of each relevant upwind State's total NOx emissions that should be eliminated as the "significant contribution" to downwind nonattainment. See Pet. App. 16a-17a. Furthermore, after EPA derived the proposed NOx budgets, EPA conducted *additional* air quality modeling, again fully documented in the record and mostly unchallenged in this case. The modeling showed that the required emissions reductions, as a whole, would have an "appreciable impact" on downwind nonattainment and that there is no instance where a required upwind emission reduction is "more than necessary to ameliorate downwind nonattainment." 63 Fed. Reg. at 57,403, 57,446-57,447.[7]

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blems. See, *e.g.*, 63 Fed. Reg. at 57,392-57,394 (comparing modeling data for upwind States that were, and were not, found to contribute "significantly" to New York City's nonattainment problem). The court of appeals pointed out that petitioners "really [did] nothing more than quibble" with EPA's modeling, and "no one quarrel[ed]" with the overall analytical approach used by EPA to interpret the data and determine significant contributions of upwind States. Pet. App. 13a, 16a. One South Carolina utility company did object to EPA's findings respecting air quality modeling for the State of South Carolina, but the court's specific rejection of the utility's arguments illustrates the soundness of the air quality modeling that EPA performed at that stage of its analysis. See *id.* at 36a-37a.

[7] EPA determined that, even after implementation of the SIP Call, some "residual nonattainment" would likely persist for at least one downwind area linked to each upwind State. See 63 Fed. Reg. at 57,404, 57,447. Thus, if anything, EPA erred on the side of

Accordingly, and contrary to petitioners' suggestions, the question presented in this case is *not* whether EPA may base a SIP Call exclusively (or primarily) on cost, rather than air quality, considerations. Rather, the question is whether EPA may use cost analyses to help develop a fair, practical, and effective regulatory approach supported—and bounded—by extensive and mostly undisputed air quality modeling. The court of appeals correctly answered that question.

b. The court of appeals ruled, on the basis of the CAA and its legislative history, that EPA reasonably construed Section 110(a)(2)(D). See Pet. App. 15a-25a. EPA concluded that, when determining the amount of each upwind State's emissions that "contribute significantly to nonattainment" in downwind States (42 U.S.C. 7410(a)(2)(D)), EPA could consider the level of emission reduction that could be achieved in the upwind States through cost-effective control measures. The CAA neither requires nor prohibits EPA's consideration of that sensible benchmark as part of the process for solving a complex, and highly fact intensive, interstate pollution problem. As the court of appeals properly recognized, EPA's approach represents a reasonable construction of its obligations under the relevant provisions of the CAA. See *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-844 (1984).[8]

In upholding EPA's construction of the statute, the court of appeals correctly observed that "[t]he term

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under-control rather than over-control. EPA stated that it would continue to monitor the progress made on ozone nonattainment and, if necessary, "may establish new budget levels and allocation mechanisms for the post-2007 timeframe." 63 Fed. Reg. at 57,428.

[8] The court of appeals correctly noted that no party argued (and the court did not hold) that EPA was *required* to consider costs under Section 110(a)(2)(D). Pet. App. 17a-18a, 22a.

'significant' does not in itself convey a thought that significance should be measured in only one dimension." Pet. App. 21a.[9] The court explained that EPA is justified in construing the term "significant" to allow for consideration of emission control costs when making regulatory decisions in the context presented here. See *id.* at 21a-25a. Furthermore, the CAA's legislative history indicates that, at least since 1977, Congress has anticipated the need to take account of pollution control costs and the economic incentives of the States that contribute to, or are affected by, interstate pollution.[10] EPA's approach fulfills Congress's objective to ameliorate the impact of interstate pollutant transport and to do so in a way that equitably distributes the burdens borne by all the States that are contributors to this complex, regional problem.

c. Petitioners are mistaken in suggesting that EPA's approach conflicts with other decisions of the courts of appeals. See APC Pet. 17-19; Michigan Pet. 11-12. They essentially argue, based on Judge Sentelle's dissent, that Congress clearly intended to

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[9] At least one of the petitioners appears to agree with this statement. See Ohio Pet. 10 ("It is true, as the court of appeals noted, that the term 'significant' is inherently open-ended and is susceptible of an interpretation that would consider costs of reduction as one of several factors in measuring 'contributions' that require a regulatory response.").

[10] See S. Rep. No. 95-127, 95th Cong., 1st Sess. 41-42 (1977) (noting the need to address the "serious inequities among several States, where one State may have more stringent [SIP] requirements than another State," and to "equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State"); see also *id.* at 42 (noting that "plants in States with more stringent control requirements" are subject to a "distinct economic and competitive disadvantage").

preclude consideration of costs under Section 110(a)(2)(D). See Pet. App. 59a-60a. The court of appeals correctly rejected petitioners' contention. Judge Sentelle relied on cases such as *American Petroleum Institute* v. *EPA*, 52 F.3d 1113 (D.C. Cir. 1995), and *Ethyl Corp.* v. *EPA*, 51 F.3d 1053 (D.C. Cir. 1995), which recognize that, where a statutory provision unambiguously confines an agency's authority to the satisfaction of a specified goal, or to the consideration of a specified factor, the agency is not at liberty to take regulatory action under that provision to effectuate other goals, or to base its decision on other factors.[11]

EPA did not violate that principle. EPA properly focused the NOx SIP Call on the precise air quality issue that is the subject of Section 110(a)(2)(D)—the elimination of emissions that "contribute significantly" to nonattainment of the NAAQS in downwind States. EPA merely considered emission control costs as part of its analysis. This case therefore does not pose the question whether EPA can take regulatory action premised on a goal or factor different from that set forth in the relevant statutory provision, nor whether EPA has taken action exceeding its statutory authority. See APC Pet. 16 (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). Rather, the question here is simply whether EPA may consider costs as part of an effort to give meaningful effect to an undefined term in the relevant provision—in this case, the phrase "contri-

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[11] See *American Petroleum Inst.*, 52 F.3d at 1119 (finding that the relevant statutory provisions unambiguously required that regulation be "directed toward the reduction of VOCs and toxics emissions"); *Ethyl Corp.*, 51 F.3d at 1058 (finding that the relevant statutory provisions unambiguously confined fuel additive waiver determination to effects of additive on emission control devices).

bute significantly to nonattainment." See Pet. App. 21a ("The fundamental dispute is over the clarity of the phrase 'contribute significantly.'"). As the court of appeals correctly recognized, that court's previous decisions support EPA's determination. See *id.* at 21a-24a.

The court of appeals appropriately focused on cases such as *NRDC* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc). See Pet. App. 23a-24a. In *NRDC*, the court considered challenges to EPA's use of emission control costs in setting an emission standard for vinyl chloride, which the CAA regulates as a "hazardous" air pollutant. See CAA § 112, 42 U.S.C. 7412 (1994 & Supp. IV 1998). Section 112 provided, at that time, that hazardous pollutant emission standards were to be set "at the level which in [the Administrator's] judgment provides an ample margin of safety to protect the public health." 824 F.2d at 1148. The court of appeals ruled that EPA may consider emission control costs in making that determination, explaining that "the phrase 'to protect the public health' evinces an intent to make health the primary consideration," but that nothing in the statute or its legislative history indicated any congressional intent to preclude consideration of costs. *Id.* at 1155.[12]

The court of appeals in this case noted that it has routinely applied its approach in *NRDC* to determine when an agency may consider costs when making regu-

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[12] The court of appeals ultimately remanded EPA's vinyl chloride rule because the court found that EPA had "*substituted* technological feasibility for health as the primary consideration." 824 F.2d at 1164 (emphasis added); see also APC Pet. 7 (discussing that aspect of the court's decision). That concern, however, is not present in this case. EPA's consideration of costs was only one component of its overall effort to implement Section 110(a)(2)(D)'s air quality goals.

latory decisions. See Pet. App. 22a-23a.[13] Petitioners have failed to identify, either here or in the proceedings below, any persuasive evidence that Congress intended to preclude EPA from considering costs under Section 110(a)(2)(D). See *id.* at 24a-25a.[14]

d. There is no merit to the contentions of Michigan and Ohio that EPA's regulatory approach represents an improper intrusion on state sovereignty. See Ohio Pet. 9-16; Michigan Pet. 14-19, 22-28. While the States' arguments are somewhat ambiguous, they seem to focus on Section 110(k)(5)'s direction that EPA shall call for revision of a State's SIP "as necessary to correct * * * inadequacies." Ohio Pet. 11; Michigan Pet. 24-25. In petitioners' view, EPA's analytical approach was so blunt that it required some States to reduce emissions

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[13] See, *e.g.*, *George E. Warren Corp.* v. *EPA*, 159 F.3d 616, 622-624 (1998) (although improvement in air quality is the "overall goal" of the CAA gasoline anti-dumping provisions, EPA permissibly considered economic factors since nothing "in the text or structure" of the statute precluded such consideration), amended on other grounds, 164 F.3d 676 (D.C. Cir. 1999); *Grand Canyon Air Tour Coalition* v. *FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998) (FAA properly considered economic impacts on air tour industry as factor in developing regulation under statute providing for "substantial restoration of natural quiet" in Grand Canyon National Park), cert. denied, 526 U.S. 1158 (1999).

[14] In the court of appeals proceedings, petitioners advanced conflicting theories of the extent to which Section 110(a)(2)(D) allows consideration of costs. See Pet. App. 17a-20a. That divergence continues here. Compare APC Pet. 16 (consideration of costs precluded), and Michigan Pet. 8 (same), with Ohio Pet. 15 (costs may be considered, but only as a "secondary consideration"). As the court of appeals aptly observed, "[a]gainst this backdrop, it would be at the very least ironic for us to say there is 'clear congressional intent to preclude consideration of cost' under 110(a)(2)(D)." Pet. App. 20a (quoting *NRDC* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc)).

more than "necessary," while other States are tasked with reducing emissions less than "necessary." Ohio Pet. 11-14; Michigan Pet. 25. Petitioners essentially contend that EPA erred by not tailoring state NOx budgets more precisely to the modeled impact of each State's emissions on downwind nonattainment areas.[15]

The court of appeals properly rejected the gist of that argument on the basis of the rulemaking record. See Pet. App. 25a-26a. The court observed that, before selecting a relatively uniform analytical approach to calculate each State's NOx budget, EPA also modeled approaches that introduced more regional variations, similar to the approaches that petitioners now suggest. *Ibid.* EPA found that the non-uniform approaches provided no significant advantages over the uniform approach, in terms of either air quality or cost, and that "[t]he complaining states offer[ed] no material critique of EPA's methodology in reaching this answer." *Id.* at 26a. The court correctly recognized that any regulatory approach to an exceedingly complex interstate air pollution problem could be attacked as having some imprecision, particularly when viewed from a parochial perspective. EPA considered various approaches and reasonably selected one that struck an appropriate balance among the relevant technical considerations.

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[15] While petitioners presented similar factual arguments to the court of appeals, they were not presented in federalism terms. The States' federalism arguments below rested on a more sweeping assertion that EPA's decision to establish NOx budgets, in and of itself, inappropriately restricted the States' prerogatives to choose emission control strategies. Pet. App. 37a-43a. The court of appeals rejected that argument, and the States do not directly challenge that aspect of the court decision here.

See *ibid.*; see also, *e.g.*, *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 376-377 (1989).[16]

e. There also is no merit to Michigan's argument that EPA's consideration of cost-effectiveness of emission controls in the NOx SIP Call conflicts with this Court's decision in *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). See Michigan Pet. 14-19. Michigan contends that in *Union Electric*, the Court held that a SIP revision submitted under Section 110(a)(2), 42 U.S.C. 7410(a)(2), may be evaluated only on the basis of whether it meets the minimum conditions identified in subparagraphs (A) to (H) of that provision and that none of those minimum conditions includes consideration of economic or technological feasibility. See Michigan Pet. 15 (citing *Union Elec.*, 427 U.S. at 257).

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[16] The complexity of developing a more "variable" type of approach is apparent from the record. Each of the States subject to the SIP Call was found to contribute "significantly" to 1-hour ozone nonattainment in numerous (in some cases, as many as a dozen or more) downwind States, and many "upwind" States are themselves "downwind" receivers of pollution contributions from other States. See 63 Fed. Reg. at 57,394-57,395. Overall, EPA found that there were more than 150 significant upwind-to-downwind state pollution contribution linkages under the 1-hour ozone standard. See *ibid.* (Table II-5). Furthermore, the magnitude, frequency, and relative amount of the air pollution contributions underlying each of those linkages varies considerably. See, *e.g.*, *id.* at 57,396-57,398 (examples of modeling data for linkages). Petitioners do not identify any alternative approach from the administrative record that would adequately address all the complex dimensions of this regional problem. Instead, petitioners suggest that EPA's approach is imprecise based on selective comparisons that fail to grapple with the larger and more complex problems that EPA needed to address. See, *e.g.*, Ohio Pet. 12-13 (comparing Indiana/New York and Pennsylvania/New York linkages); Michigan Pet. 22-23 (same).

Michigan's understanding of *Union Electric* is incorrect.

The Court's *Union Electric* decision addressed a sulfur dioxide SIP submitted under the requirement of Section 110(a)(2)(A)(i), which provided, at that time, that each State must formulate a SIP to achieve the primary NAAQS "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan." 427 U.S. at 249-251. The Court stated in broad terms that "Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a [SIP]." *Id.* at 256. But the Court also made clear that its holding concerning economic and technological feasibility was focused on the type of SIP revision at issue. *Id.* at 265 ("In sum, we have concluded that claims of economic or technological infeasibility may not be considered by the Administrator *in evaluating a state requirement that primary ambient air quality standards be met in the mandatory three years.*") (emphasis added). *Union Electric* expressly recognized that consideration of "[e]conomic and technological factors" may be appropriate in circumstances other than those directly at issue in that case. *Id.* at 264-265 n.13. Michigan is accordingly mistaken in suggesting that *Union Electric* precludes EPA from considering economic and technological factors when taking actions under Section 110(a)(2)(D).[17]

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[17] Michigan's reliance on *Train* v. *NRDC*, 421 U.S. 60, 79 (1975), is similarly misplaced. See Michigan Pet. 25. The *Train* decision—which held that certain amendments to SIPs should be treated as "revisions" and not as "postponement[s]" and, therefore, should be subject to more relaxed statutory requirements under the version of the CAA then in effect, 421 U.S. at 98-99—has no direct bearing on the issues presented here.

2. APC alone objects to the court of appeals' decision on nondelegation grounds. See APC Pet. 19-21. As APC recognizes, the court of appeals recently relied on the nondelegation doctrine to invalidate EPA's promulgation of revised ozone and particulate matter NAAQS. See *ATA*, *supra*. This Court has granted the federal government's petition for a writ of certiorari challenging the court of appeals' *ATA* decision. See *Browner* v. *ATA*, No. 00-1297. Regardless of the outcome of that case, the court of appeals was correct in ruling that Section 110(a)(2)(D) does not violate the nondelegation doctrine.

The court of appeals concluded that its *ATA* ruling, which requires agencies to identify an "intelligible principle" when exercising discretion under broad statutory grants, applies only to agency action that has nationwide effect. See Pet. App. 26a-27a. The court rejected petitioners' nondelegation challenge primarily on the ground that EPA's interpretation of Section 110(a)(2)(D) has "confined the statute to a modest role." *Id.* at 28a. The Court need not rely on that particular distinction, however, because Section 110(a)(2)(D) is constitutional under any reasonable view of the nondelegation doctrine. This Court's decisions recognize that the nondelegation doctrine is satisfied if a statutory grant of authority itself sets forth an "intelligible principle" that "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." See *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (citation omitted). Section 110(a)(2)(D) plainly satisfies that standard. It quite specifically directs EPA to ensure that each SIP contains adequate provisions to prevent emission of air pollutants in amounts that, inter alia, "contribute significantly to nonattainment in, or inter-

fere with maintenance by, any other State with respect to any [NAAQS]." 42 U.S.C. 7410(a)(2)(D). Section 110(a)(2)(D) simply confers the normal quantum of discretion that agencies routinely exercise in administering statutory programs. See, *e.g.*, *Chevron U.S.A.*, 467 U.S. at 843-845.

APC's further suggestion that the Court should alternatively find "EPA's selection of its $2000-per-ton cut-off point" to be "arbitrary and capricious" is also without merit. APC Pet. 20-21. APC did not make that argument in the court of appeals and has not even identified it as a question presented in its petition for a writ of certiorari. See APC Pet. i. APC's argument rests on an out-of-context partial quotation from the court of appeals' nondelegation ruling. The court stated that the $2000-per-ton threshold, viewed from the perspective of *ATA*'s *nondelegation* ruling, is a "radically incomplete line-drawing device." Pet. App. 26a; APC Pet. 20. The court nevertheless expressly acknowledged the extensive *factual* support for the $2000-per-ton threshold in the administrative record. Pet. App. 27a.[18]

Whatever the merits of the court of appeals' nondelegation ruling in *ATA*, that decision does not alter the established standard for determining whether an agency's action is arbitrary or capricious. See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971) (a court is limited to examining

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[18] See Pet. App. 27a ("EPA indicates that it rested the $2000/ton figure on 'NOx emissions controls that are available and of comparable cost to other recently undertaken or planned NOx measures'") (quoting 63 Fed. Reg. at 57,400). EPA's determination was based on extensive analysis of emission control data that was fully documented in the rulemaking record. See 63 Fed. Reg. at 57,377-57,378, 57,399-57,403.

whether the agency's action "was based on a consideration of the relevant factors and whether there has been a clear error of judgment"). EPA amply justified its choice of the $2000-per-ton threshold in the rulemaking proceeding. 63 Fed. Reg. at 57,377-57,378, 57,399-57,403. Hence, even if APC had raised a challenge to EPA's selection of that threshold under the arbitrary or capricious standard in the court of appeals, the challenge would have failed. There is no reason for this Court to address, for the first time in this case, that entirely factbound question.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted.

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Nos. 00-632 and 00-633

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

STATES OF OHIO AND INDIANA,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., KEYSPAN GENERATION LLC, PECO ENERGY COMPANY, AND PSEG POWER LLC

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QUESTION PRESENTED

Whether this Court should grant certiorari to consider the Court of Appeals' correct determination that the Environmental Protection Agency did not abuse its discretion or violate the federalist structure of the Clean Air Act when it considered a cost factor in the determination of significant contribution under Section 110(a)(2)(D) of the Act.

PARTIES TO THE PROCEEDINGS AND RULE 26.1 STATEMENTS

The following is a list of the parties filing this brief in opposition, together with their statements pursuant to S. Ct. R. 26.1. These parties were intervenors below in support of affirmance and are respondents in this Court pursuant to S. Ct. R. 12.6:

Consolidated Edison Company of New York, Inc., states that its parent corporation is Consolidated Edison, Inc., a publicly held corporation. Consolidated Edison Company has no affiliates or subsidiaries that have issued shares or debt securities to the public.

KeySpan Generation LLC states that its parent corporation is MarketSpan Corporation, d/b/a KeySpan Energy, a publicly held company. An affiliate of KeySpan Generation LLC, The Houston Exploration Company, has also issued shares or debt securities to the public.

PECO Energy Company states that its parent company, Exelon Corporation, has issued stock to the public. no other affiliates or subsidiaries of the Company have issued shares or debt securities to the public.

PSEG Power LLC (formerly Public Service Electric & Gas Co.) states that its parent company, Public Service Enterprise Group Incorporated, has issued stock to the public. No other affiliates or subsidiaries of PSEG Power have issued shares or debt securities to the public.

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BRIEF IN OPPOSITION FOR CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., KEYSPAN GENERATION LLC, AND PSEG POWER LLC

Respondents Consolidated Edison Company of New York, Inc., Keyspan Generation LLC, and PSEG Power LLC respectfully request that the Court deny the petitions for certiorari filed in this case by the State of Michigan, *et al.* in No. 00-632 ("Michigan") and by the States of Ohio and Indiana in No. 00-633 ("Ohio and Indiana"). We refer to these petitioners collectively as "Petitioning States."

INTRODUCTION

This case meets none of the criteria warranting an exercise of this Court's certiorari jurisdiction. *See* S. Ct. R. 10. It implicates no conflict among the circuits and raises no important unsettled questions of law. To the contrary, this case involves the ordinary exercise of discretion by the Environmental Protection Agency ("EPA") in implementing a statutory provision of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q (1994 & Supp. III 1997), requiring states to address the interstate transport of air pollution. The rule at issue, 63 Fed. Reg. 57,356-537 (Oct. 27, 1998), which is referred to as the "NOx SIP Call," requires certain states to revise their State Implementation Plans ("SIPs") to reduce emissions of nitrogen oxides (NOx) that impact ozone attainment problems in downwind areas.

In an attempt to transform this typical administrative rulemaking case into one worthy of this Court's review, Petitioning States argue that the Court of Appeals decision in this case conflicts with holdings of the D.C. Circuit in other CAA cases, including *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027 ("*ATA*"), *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003, 2193 (2000). Petitioning States' attempt to manufacture certworthy issues from superficial similarities in these cases is misguided. Far from implicating important jurisprudential conflicts, this case involves an unremarkable affirmation of agency discretion consistent with well-settled law.

Petitioning States also argue that this case raises important federalism and interstate equity issues relating to the interstate transport of air pollution that require this Court's review. While the CAA provision at issue certainly does implicate issues of federalism and interstate equity, the D.C. Circuit correctly determined that EPA's rulemaking was properly responsive to these concerns. Petitioning States do

not provide any compelling arguments for devoting this Court's scarce resources to further review of these matters.

Respondents filing this opposition provide the Court with an important perspective on the rule at issue in this case: that of electric generating companies in downwind states who view the NOx SIP Call as a soundly reasoned, technologically and economically feasible, *necessary* step to address the complex and persistent problem of interstate transport of ozone.

Over the last decade electric generators in downwind states have invested many millions of dollars in control technologies to improve air quality and assist in their states' efforts to attain the national ozone standard. The beneficial health impacts of these emission control efforts, however, have been largely thwarted by imported NOx from upwind sources in the South and Midwest that are not subject to as strict emission control requirements and can produce electricity using higher-emitting, cheaper fuel sources. Their transported emissions intermingle with other airborne emissions and significantly increase downwind states' ozone levels. By requiring upwind states to control their sources not only to prevent local air pollution but to prevent—as the CAA requires—significant contribution to ozone attainment problems downwind, the NOx SIP Call will remedy this gross inequity and its resulting adverse health impacts.

COUNTERSTATEMENT

As Petitioning States explain, Michigan at 4-5, Ohio and Indiana at 3-4, Section 110(a)(2)(D) of the CAA, 42 U.S.C. § 7410(a)(2)(D), requires states to prevent air pollution sources located within their boundaries from significantly contributing to air quality attainment problems in downwind states. Pursuant to its expressly delegated authority to implement that provision, EPA promulgated the NOx SIP

Call, requiring certain states in the eastern half of the United States to revise their state air quality plans to eliminate amounts of NOx emissions that EPA had determined were "significantly contributing" to downwind ozone attainment problems.

While Petitioning States characterize EPA's calculation of "significant contribution" in the NOx SIP Call as one based solely on cost considerations, *see* Michigan at 6-7, Ohio and Indiana at 4, EPA's determination of significant contribution was in fact a two-step process based primarily on air quality factors and only secondarily on cost considerations.

In the first step, the agency identified states that were "significantly contributing" to downwind attainment problems, using air quality modeling that determined whether the NOx emissions of a state, when combined with emissions from other states, were a significant factor in the formation of ozone in downwind states. *See* 63 Fed. Reg. at 57,381. Only after having thus identified, on the basis of air quality factors alone, the states that were significantly contributing to ozone attainment problems downwind did EPA use a cost-based methodology to calculate the amounts of NOx emissions that these states could permissibly emit without violating the Section 110 prohibition on significant contribution. *Id.*

Because air quality modeling is not well-adapted to quantify precise emissions impacts,[1] in this second step EPA identified a set of cost-effective control technologies and then, using state-specific NOx inventory information, modeled the air quality impacts of applying these technologies to the covered states. Finding that the resulting levels of NOx emissions would significantly reduce ozone formation in

[1] Air quality models, particularly broad regional scale models such as those used in the NOx SIP Call, are excellent tools for identifying directional trends and relative impacts, but are not regarded as well-suited for determining precise quantities of emissions impacts.

downwind states, EPA established those levels as state-specific "NOx budgets"—for each state, the total amount of NOx emissions that could be emitted consistent with Section 110's prohibition on significant contribution to transport. Specifically, EPA's NOx emission budgets were based on the NOx emissions levels that would be permitted in these states under uniform application to their NOx inventories of certain NOx pollution controls that EPA had determined could be cost-effectively implemented at $2,000 per ton or less. *See* 63 Fed. Reg. at 57,365.

The Court of Appeals upheld EPA's consideration of this cost factor in its determination of significant contribution under Section 110(a)(2)(D). It also rejected challengers' arguments that the CAA requires state-specific quantifications of significant contribution and that the SIP Call Rule impermissibly denied states their rights under the CAA to determine their implementation strategies.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER DECISIONS OF THE D.C. CIRCUIT

In an attempt to manufacture a case for certiorari where none exists, Petitioning States argue that the decision below conflicts with holdings of this Court and with prior decisions of the D.C. Circuit regarding EPA's discretion to consider costs in implementing the CAA. *See* Michigan at 7-8, 20-21; Ohio and Indiana at 14-15. Specifically, Petitioning States point to two of this Court's cases, *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), and *Train* v. *NRDC*, 421 U.S. 60 (1976), addressing EPA's authority to consider economic factors when evaluating the adequacy of a state's SIP submittals under CAA Section 110, 42 U.S. § 7410, and to two D.C. Circuit decisions, *Lead Indus. Ass'n* v. *EPA*, 647 F.2d

1130 (D.C. Cir.), *cert. denied,* 449 U.S. 1042 (1980), and *ATA,* 175 F.3d 1027, holding that EPA lacks authority to consider costs when setting National Ambient Air Quality Standards ("NAAQS") under CAA Section 109, 42 U.S.C. § 7409.

A. The Decision Below Does Not Conflict With Decisions Of This Court Addressing EPA's Authority To Consider Cost Factors Under CAA Section 110.

The decision below does not conflict with the Section 110 precedents of this Court cited by Petitioning States. In both *Union Electric,* 427 U.S. at 257 & n.5, and *Train,* 421 U.S. at 90-91, the Court addressed arguments about EPA's authority under provisions of Section 110 other than Section 110(a)(2)(D) to consider claims of economic and technological *infeasibility—i.e.*, to use cost considerations to excuse a state's failure to comply with EPA's interpretation of the requirements of Section 110. These cases are distinguishable first because they involve challenges to agency action arising under, and interpreting, different provisions of Section 110 than the one at issue in this case. More importantly, the underlying principle of these cases—that EPA may not rely on cost factors to allow states to *impede* CAA compliance—does not conflict with the decision below upholding EPA's use of a cost factor in its determination of how states must comply with Section 110(a)(2)(D)'s transport prohibition.

Indeed, in *Union Electric* this Court expressly addressed EPA's authority to consider costs in the context of facilitating rather than hampering compliance with Section 110. As Petitioning States acknowledge, Michigan at 9 n.4, the Court indicated that, in evaluating whether a SIP includes provisions for attaining the NAAQS "as expeditiously as practicable" as required under Section 110(a)(2)(A)(i), EPA "may consider whether it is economically or technologically

possible for the state plan to require more rapid progress than it does." *Id.* (citing *Union Electric*, 427 U.S. at 265, n.13). EPA's use of a cost factor in determining significant contribution in the NOx SIP Call is consistent with the principle that the agency may consider costs in the context of facilitating state compliance with Section 110's air quality goals. [2]

B. The Decision Below Does Not Conflict With D.C. Circuit Decisions Addressing EPA's Authority To Consider Cost Factors Under CAA Section 109.

Contrary to Petitioning States' assertions, the D.C. Circuit's holding in the *ATA* and *Lead Industries* cases—that EPA is prohibited from considering costs when establishing the NAAQS under Section 109—does not conflict with the decision below upholding EPA's authority to consider cost factors in determining significant contribution under Section 110(a)(2)(D). Sections 109 and 110 are different statutory sections with different purposes. Section 109 requires EPA to set NAAQS that, "based on [statutory] criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b). Section 110 is a very lengthy section with many different provisions detailing the many obligations of states with respect to their air quality implementation plans. EPA is charged with responsibility for implementing both sections, of course, but the statutory

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[2] Another circuit has also concluded that cost considerations are permissible in enforcing Section 110's requirements where those considerations are employed to achieve, not impede, compliance with Section 110's air quality goals. *See South Terminal Corp.* v. *EPA*, 504 F.2d 646, 676 (1st Cir. 1974) (observing, with respect to EPA regional transportation control plan imposed as a Federal Implementation Plan under Section 110, that "[e]conomic considerations may play some role * * * in EPA's selection among alternative means to achieve its mandated clean air goal").

standards that EPA must interpret in defining the agency's and the states' obligations under the two sections are entirely unrelated to each other.

Thus, the decision below does not present an issue similar to the one before this Court in *ATA*. Indeed, the Court of Appeals expressly noted that the NOx SIP Call case only concerned whether EPA could permissibly consider cost in its implementation of Section 110(a)(2)(D) and did not raise issues as to whether the agency was required to consider costs or was permitted to use a cost/benefit criterion in selecting its final rule, Michigan App. at 15a-16a, issues that are raised in *ATA*. [3]

Certainly, the judges who authored the opinion below would be surprised to learn that the decision conflicts with prior D.C. Circuit precedent. The opinion provides a lengthy analysis of how the decision is derived from the "settled law of this circuit." Michigan App. at 20a-22a. In particular, the opinion focuses on a prior case upholding EPA's authority to consider costs when regulating hazardous air pollutants under Section 112 of the CAA, 42 U.S.C. § 7412, to achieve an "ample margin of safety" to protect public health, *see* Michigan App. at 20a (citing *NRDC* v. *EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc)). The Court of Appeals observed that *NRDC*, along with several other cases, stands for the principle that unless there is "clear congressional intent to

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[3] Indeed, the lack of conflict between the D.C. Circuit's holdings is evidenced by the fact that the decision below issued only ten months after the *ATA* decision, with parts of both decisions authored by the same judge; clearly, Circuit Judge Williams did not perceive any conflict between the two cases. Further, petitions for rehearing were rejected by the D.C. Circuit. *See* Michigan App. at 55a-58a.

preclude consideration of cost," an agency is not barred from considering it. *Id.*

Applying the *NRDC* standard, the D.C. Circuit concluded that EPA's consideration of cost factors in the significant contribution determination was permissible, stating that "there is nothing in the text, structure or history of § 110(a)(2)(D) that bars EPA from considering cost in its application." *Id.* at 22a.

There is nothing about this holding that remotely warrants this Court's intervention. There is no conflict between it and the other cited cases addressing EPA's authority to consider costs under Sections 109, 110, or 112. Indeed, the CAA precedents are consistent with each other. They indicate that EPA's authority to consider cost factors when implementing the CAA must be determined on a case-by-case basis through analysis of congressional intent, as revealed by the text of the statutory provision under which the agency acts and other appropriate indicia, as well as the factual circumstances of the specific consideration of costs at issue.

In reality, Petitioning States do not seek from this Court a "resolution" of the Section 109 and Section 110 precedents, but rather a modification of earlier holdings with which they disagree. *See, e.g.*, Michigan at 21 (advocating that this Court "resolve" alleged conflict by flipping the D.C. Circuit's prior holdings and deciding that EPA *must* consider costs under Section 109 but *cannot* consider them under Section 110); *see also* Ohio and Indiana at 14-15 (advocating that this Court hold that EPA *may* consider costs under both Sections 109 and 110, but only as a secondary factor to health concerns under Section 109 and to air quality concerns under Section 110).

Given Petitioning States' failure to demonstrate any conflicts between the decision below and other CAA cases addressing EPA's authority to consider costs, as well as the

lack of identity between the issues in this case and those in *ATA*, this Court should deny the request of Ohio and Indiana to defer consideration of the certiorari petitions until after resolution of the *ATA* cases. *See* Ohio and Indiana at 16 n.8, 17.

Even were this Court persuaded that there is some tension in D.C. Circuit precedents regarding EPA's authority to consider costs in implementing the CAA, it is well-settled that this Court does not sit to resolve intracircuit conflicts. The established principle, as Justice Harlan once wrote, is that "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Robert L. Stern, et al., Supreme Court Practice 176 (7th ed. 1993) (quoting Hon. John M. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958)). The *en banc* process is the established means of identifying and settling any intracircuit conflicts.

Petitioning States also attempt to argue that, because EPA actions under the CAA that have nationwide scope can only be reviewed by the D.C. Circuit, conflicts among D.C. Circuit CAA decisions are "on par" with conflicts between different circuits. Michigan at 19. They offer no support for this theory, which is inconsistent with the very reason the CAA provides nationwide jurisdiction in the D.C. Circuit in the first place.

II. THE DECISION BELOW CORRECTLY AFFIRMED EPA'S DISCRETION TO CONSIDER COST FACTORS IN THE DETERMINATION OF SIGNIFICANT CONTRIBUTION

The issue before the D.C. Circuit was not whether EPA's consideration of a cost factor under Section 110(a)(2)(D) is the correct way to determine significant contribution, but

whether it is a permissible one. Neither the CAA nor its legislative history detail how Congress intended the phrase "contribute significantly" to be interpreted.[4] Thus, as established under *Chevron*'s familiar two-step framework, the question for a reviewing court is whether the agency action is based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). EPA's interpretation is reviewed with great deference and upheld if reasonable. *See, e.g., Association of Am. Railroads* v. *Surface Transp. Bd.*, 161 F.3d 58, 64 (D.C. Cir. 1998) (court engaging in *Chevron* step-two analysis affords "significant leeway" to agency interpretation); *OSG Bulk Ships, Inc.* v. *United States*, 132 F.3d 808, 814 (D.C. Cir. 1998) (court accords "great deference to the particular way in which the agency chooses to implement a statute that it is empowered to administer"). Deference to EPA's interpretation is indeed at its zenith in this case due to the highly technical nature of the significant contribution determination and the complex statute in which it is embedded. *See New York* v. *EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988) (court accords great deference to decisions within agency's "area of special expertise, at the frontiers of science"), *cert. denied*, 489 U.S. 1065 (1989).

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[4] Petitioning States Michigan *et al.* argue that the "plain language" of Section 110(a)(2)(D), and the legislative history associated with it, make clear that "[t]he word 'significantly' goes to the level of the impact and cannot reasonably be interpreted to allow the consideration of economic efficiency." Michigan at 13. As they note, the 1990 Amendments changed the transport prohibition from a prohibition on interstate pollution that "prevent[ed] attainment" downwind to the current significant contribution standard. While Petitioning States see this change as indicating that the word significantly goes to the level of impact, it is just as plausible that the amendment from "prevent" to "significantly contribute" reflects congressional awareness that it is difficult, if not impossible, from an air-quality perspective alone to quantify the role of particular upwind states in determining downwind attainment.

The record in this case more than substantiates the Court of Appeals' judgment that EPA's consideration of costs in implementing the transport prohibition was permissible and reasonable. As detailed above, the court concluded, based on well-established precedent, that nothing in the CAA precludes EPA from considering cost when making a remedial determination under its authority to issue SIP Calls. Further, the D.C. Circuit recognized that EPA exercised its discretion to consider costs under Section 110(a)(2)(D) in an appropriate manner. Indeed, the court stated that "[i]n some contexts, 'significant' begs a consideration of costs," Michigan App. at 19a, and detailed at length its reasons for concluding that the determination of significant contribution under Section 110(a)(2)(D) was a circumstance that warranted consideration of costs, *see id.* at 19a-22a.

Petitioning States assert that EPA's determination of significant contribution relied on an "arbitrary, unbounded" standard. *See* Ohio and Indiana at 9-12; *see also* Michigan at 23 n.13. Petitioning States are wrong. As the Court of Appeals recognized, EPA's consideration of cost in its significant contribution determination was a reasonable decision, given the complexities of ozone transport, to design a solution based on determining whether downwind attainment problems could be addressed by eliminating at least the amounts of NOx emissions that could be most cost-effectively eliminated. *See* Michigan App. at 14a-15a. Moreover, EPA's air quality evaluation of the cost methodology included modeling and comparative analysis of the downwind impacts of the cost-effective state NOx budgets as well as of more stringent control measures. *See* 63 Fed. Reg. at 57412-13. Thus, EPA's use of a cost factor was neither arbitrary nor unbounded but rather reflected a complex, reasoned approach to identifying and addressing significant contribution.

Moreover, the agency's decision to consider cost-effectiveness in devising a remedy for states' violations of Section 110(a)(2)(D) is consistent with basic principles of ozone nonattainment planning. As reflected in twenty years' worth of congressional guidance, Congress and EPA have consistently concluded that in the absence of complete knowledge on the sources and receptors of ozone transport, it is reasonable to assign a level of emissions control to states based on the technical and economic feasibility of available controls.[5] Accordingly, as the Court of Appeals properly recognized, Michigan App. at 18a-20a, it was entirely appropriate for EPA to take such factors into account, in conjunction with air quality factors, to calculate the emission reductions necessary for states to comply with Section 110's transport prohibition.

Indeed, EPA's use of a cost factor in the NOx SIP Call is consistent with the views expressed by Petitioning States regarding when consideration of cost is appropriate under Section 110. *See, e.g.*, Ohio and Indiana at 15 (stating that cost consideration is appropriate under Section 110 when the consideration of cost is secondary to air quality factors) and Michigan at 21 (stating that cost considerations are appropri-

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[5] The central concepts guiding federal and state ozone attainment efforts over the past two decades have been requirements related to "reasonably available control measures" (RACM) and "reasonably available control technology" (RACT). *See, e.g.*, 42 U.S.C. § 7511(b)(2)(A) (requiring ozone nonattainment areas to be reclassified to follow through on requirements in § 7511a to implement RACT measures); *id.* § 7511c (requiring states in Northeast Ozone Transport Region to implement RACT). And for more than two decades, EPA policy and guidance have interpreted RACM and RACT requirements to call for the implementation of controls that are technologically and *economically* feasible. *See, e.g.*, 45 Fed. Reg. 59,331 (Sept. 9, 1980) (defining RACT as "the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility").

ate under Section 110 when they are "relevant to [the] decision and indispensable in providing a reasoned basis for the agency's action").

Thus, Petitioning States have not established any grounds warranting this Court's review of EPA's consideration of cost in determining significant contribution under Section 110(a)(2)(D).

III. EPA'S SIGNIFICANT CONTRIBUTION DETERMINATION DOES NOT VIOLATE FEDERALISM OR INTERSTATE EQUITY CONCERNS

Petitioning States Ohio and Indiana argue that EPA's approach in the NOx SIP Call is not consistent with the "federalism-sensitive" approach of the CAA because it improperly ignores the significance of state boundaries and does not base emission reduction obligations upon an assessment of each state's proportionate contribution to downwind attainment problems. Ohio and Indiana at 9-16. They also contend that the decision below deserves review because, like other state border disputes involving natural resources, this case involves an important national problem and the States are opposed to one another concerning the allocation of responsibility for solving this problem. *Id.* at 16-17. These arguments merely rephrase complaints that have already been considered and rejected in the decision below. *See* Michigan App. at 11a-13a, 22a-23a and 33a-37a (holding that EPA conducted sufficient state-specific analyses of significant contribution, that EPA's use of regional uniform controls to calculate the states' NOx budgets was reasonable, and that EPA's specification of NOx budgets did not violate states' rights under the CAA to make implementation decisions).

A. EPA's Significant Contribution Determination Does Not Ignore the Significance of States' Boundaries in Determining their Reduction Obligations.

Ohio and Indiana argue that EPA's significant contribution determination violates the "cooperative federalism" scheme of the CAA by ignoring the significance of state boundaries. Ohio and Indiana at 8. As Michigan, et al. describe, the CAA assigns EPA the responsibility to promulgate air quality standards and to determine whether states are meeting all applicable CAA requirements, while assigning to states the responsibility to design SIPs to achieve the federally-established CAA requirements. Michigan at 4. This scheme includes deference to state authority on intrastate issues and deference to federal authority on issues of interstate concern. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 103-108 (1972) (recognizing necessity of federal common law remedy for interstate water pollution where no federal statutory remedy exists). EPA's SIP Call is entirely consistent with this statutory federalism scheme. In the SIP Call, EPA properly met its statutorily-defined federal role under the CAA to determine which states were failing to meet their transport obligations under Section 110(a)(2)(D), and to require those states to revise their SIPs accordingly.

Moreover, contrary to the assertion that EPA's approach ignored the significance of state boundaries, EPA's approach respects the significance of state boundaries in several ways. First, as the Court of Appeals recognized, *see* Michigan App. at 33a-37a, in calculating a remedial strategy to address transport, EPA appropriately determined only the necessary emissions reductions and left to the states to determine for themselves the best implementation strategies, as required by *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir.), *modified on other grounds*, 116 F.3d 499 (D.C. Cir. 1997). Second, EPA used inventories of NOx emissions from covered states to determine, applying its cost-effectiveness methodology, the

amounts of NOx emissions that each state could emit consistent with Section 110's prohibition on significant contribution. And third, as the D.C. Circuit recognized, *see* Michigan App. at 11a-13a, EPA conducted state-specific air quality modeling sufficient to confirm that the proposed state NOx budgets would satisfactorily address the prohibited regional transport.

Petitioning States also misleadingly imply that EPA's $2,000 per ton cost-effectiveness standard improperly affects states' implementation decisions about how to achieve the NOx emissions budgets derived from the standard, and that EPA's use of the cost factor resulted in EPA promulgating less stringent budgets than necessary for some states. *See* Ohio and Indiana at 13-14; Michigan at 22-25. To the contrary, EPA's significant contribution determination did not excuse any states from achieving the reductions EPA determined were necessary to address downwind impacts, nor does the cost factor EPA used in that determination play any role at all in state's implementation decisions. The states' obligations under the SIP Call are not to impose cost-effective controls, but rather to limit sources within their borders to the specific amounts of NOx emissions EPA determined, using the cost-effectiveness methodology, that each state could emit consistent with Section 110(a)(2)(D). As the Court of Appeals affirmed, Michigan App. at 33a-37a, the SIP Call appropriately leaves states free to achieve the mandated emissions levels in any manner they choose, including through expensive, technology-forcing mechanisms, if they desire. *See id.* at 37a. [6]

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[6] EPA's rule pointed out that certain controls—namely, controls on coal-fired electric generators and large industrial sources—would be the most cost-effective means of meeting the established budgets, but the agency made clear that states could employ any emissions control measure they chose to bring their emissions within the NOx budget requirements. *See* 63 Fed. Reg. at 57,400.

Thus, EPA's significant contribution determination is appropriately sensitive to federalism concerns. It does not ignore the significance of states' boundaries, nor does it interfere with states' implementation rights with regard to ozone transport.

B. The Federalism Structure of the CAA Does Not Require EPA to Adopt a Proportional Interpretation of States' Emission Reduction Obligations under Section 110(a)(2)(D).

Ohio and Indiana urge this Court to find with respect to interstate transport that the federalist scheme of the CAA requires that each State "contribute to the solution in proportion to its contribution to the problem," Ohio and Indiana at 14. They do not explain, however, why the cooperative federalism structure of the CAA requires that the term "significantly" in Section 110(a)(2)(D) must be interpreted in proportionate terms. Mathematical proportionality is but one possible interpretation of the "significant contribution" standard and, as detailed above, it is not the interpretation that EPA, in its discretion, found to be the most reasonable in the context of ozone transport.

Petitioning States support their arguments by detailing some apparently anomalous or nonproportional results of EPA's significant contribution determination that they allege violate federalism and state sovereignty principles. *See* Ohio and Indiana at 12-13; Michigan at 22-24. For example, Ohio and Indiana complain that "a relatively large contribution of ozone [from Pennsylvania to New York] is considered insignificant under EPA's standard while a nominal contribution of ozone [from Indiana to New York] is considered significant."[7] Ohio and Indiana at 13; *see also* Michigan at

[7] Ohio and Indiana do acknowledge that "[o]f course, Indiana has an effect on other downwind nonattainment areas besides New York," Ohio and Indiana at 13 n.6, but still assert that somehow Indiana's emission reduction obligations should be based on the "actual amounts" contributed to ozone problems elsewhere. What

24-25 (complaining that such outcomes illegitimately require states to do both more and less than Congress intended them to do to address interstate transport).

The Court of Appeals properly rejected similar complaints below when it determined that EPA's state-specific modeling was sufficient to support the rationality of the NOx SIP Call, *see* Michigan App. at 11a-13a, and that EPA's use of regionally uniform controls to establish the budgets was reasonable, *see id.* at 22a-23a. The isolated examples of nonproportional outcomes raised by Petitioning States do not warrant this Court's review of the lower court's findings. The examples are based on modeling of unidimensional, static and partial outcomes of the SIP Call (that is, impacts from one state to one other state) when in reality ozone transport is multidimensional and dynamic (that is, each state impacts and is impacted by multiple other states in a constantly changing scenario).

In the real world, the "significance" of an upwind state's NOx emissions on downwind ozone nonattainment is a function not only of air movements, weather, and chemical transformations that vary endlessly over time, but also of the actions of all the other upwind sources in other states, as well as federal, state and local air pollution laws and other factors. In these circumstances, as the court below found, EPA's functional interpretation of the term "significantly" reasonably implements the CAA's transport prohibition, particularly as EPA's interpretation is also appropriately sensitive to states' rights and interstate equities under the CAA.

Ohio and Indiana fail to acknowledge, however, is that determining "the" "actual" amounts that Indiana will contribute to downwind problems in other states is in some sense a conceptual conundrum, as those amounts will vary at different times not only with different weather patterns but also with variations in the emission amounts coming from other states.

C. EPA's Significant Contribution Determination Does Not Raise Interstate Equity Issues Requiring this Court's Review.

Ohio and Indiana argue that this case is similar to the disputes among States concerning borders and natural resources over which this Court has exercised original jurisdiction, *see* Ohio and Indiana at 17. To the contrary, this case is nothing like those cases, which typically have arisen under common and state law. The current case arises under one of the most detailed and comprehensive federal regulatory statutes, a statute in which Congress expressly answered the difficult question of how the burdens of interstate transport should be addressed. Section 110(a)(2)(D) of the CAA clearly indicates that states must control their sources to prevent significant contribution to downwind attainment difficulties. Given this unequivocal congressional directive, and the fact that the Court below correctly upheld the agency's approach to implementing it, there is no need for further review by this Court of the reasonableness of the agency's approach.

Moreover, contrary to the view of Petitioning States Ohio and Indiana, the fact that States are lined up against one another with regard to the NOx SIP Call does not indicate a flawed rule mandating review by this Court. Rather, it reflects the difficulty of devising a rule to address interstate responsibility for ozone transport that can please every state. Indeed, as Michigan et al. acknowledge, the inability or unwillingness of states to meet their obligations to eliminate downwind pollution contributions is an important reason that Congress revised the CAA in 1990 to strengthen the statutory provisions addressing interstate transport, including Section 110(a)(2)(D). *See* Michigan at 13. Thus, in this case, EPA has simply performed its congressionally-delegated federal role of determining how states must meet their transport obligations, a role made all the more important since the states' interests are diverse from each other.

In addition to addressing the interstate transport problem, however, EPA's approach in the NOx SIP Call also serves to rectify an existing inequity among states' air pollution control schemes that has resulted from the impacts of ozone transport. For decades, sources in the South and Midwest—areas generally in attainment with the national ambient air quality ozone standards—have been able to emit vast amounts of NOx emissions that travel downwind to North-east and Mid-Atlantic states not in attainment with ozone air quality standards. These downwind states suffer not only adverse health and environmental effects from the pollution transported into the region, but also have been required to impose increasingly stringent and costly control measures on sources within their borders as they try to reach ozone attainment. In particular, electric generating companies in downwind states have been forced to install expensive emission control equipment to address not only their local emissions but also those transported from upwind regions.

By requiring states to comply with Section 110(a)(2)(D) 's transport prohibition, the SIP Call brings upwind states to account for the NOx emissions their sources send downwind, and does so while recognizing the economic constraints on upwind states' ability to implement emission controls. Thus, the SIP Call promotes both cleaner air and a more equitable allocation of the regional pollution reduction burden, as EPA has recognized, *see* 63 Fed. Reg. at 57,404.

In short, EPA's determination of significant contribution is appropriately sensitive to issues of federalism and interstate equity and does not warrant attention from this Court. Congress has required states to prevent significant contribution to downwind attainment problems and delegated to EPA the duty to ensure that states comply. As the D.C. Circuit held, EPA's significant contribution determination properly took into account state-specific factors and does not improperly deny states their congressionally-assigned implementa-

tion role in the CAA statutory scheme. While Petitioning States may disagree with this result, they have identified no compelling reason for this Court to devote its scarce resources to an exercise in purported error-correction.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

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Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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REPLY ARGUMENT

EPA argues that petitioners mischaracterized the manner in which EPA considered cost-effectiveness in determining "significant contribution" in the NOx SIP Call rule. EPA Brief in Opp. 10. This is not true. These petitioners do not now contest EPA's representation that it utilized state of the art computer modeling of air quality to show magnitude, frequency, and relative amount of each upwind state's emissions contributions to each downwind nonattainment problem. EPA Brief in Opp. 5. The modeling, however, was used only to determine which states met a threshold (determined to be so low as to be within background noise) for inclusion in the pool of states subject to the SIP Call. The problem arises during the second stage of EPA's analysis. Once included in the SIP Call, a state's required reduction to eliminate its "significant contribution" as defined by EPA was based solely on the cost of controls under EPA's own notion of economic fairness. EPA Brief in Opp. 9. Air quality impacts were irrelevant. If a state's NOx emissions could be reduced at a cost of no more than $2,000 per ton, EPA considered them to be significantly contributing to some downwind state's nonattainment problems, never mind which state and to what extent. On the other hand, all of a state's NOx emissions which cost more than $2,000 per ton to eliminate were considered to not be significantly contributing to the downwind nonattainment problem and did not have to be eliminated regardless of the amount of actual impact downwind. Therefore, EPA's claim that "it *merely* considered emission control costs as part of its analysis" is misleading. EPA Brief in Opp. 14, (emphasis added).

There is no authority in § 110(a)(2)(D) for EPA to determine the amount of NOx reduction that each upwind state must make by defining "significant contribution" in any way other than air quality impacts downwind. After defining "significant contribution" in terms of air quality impact downwind in order to determine what states to include in the NOx SIP Call, EPA cannot redefine "significant contribution" in terms of the costs of implementing controls in order to determine the amount of NOx reduction each of the upwind states must make to eliminate its "significant contribution." Under the statute, a SIP must "contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the state from emitting any air

pollutant in amounts which will . . . contribute significantly to nonattainment in . . . any other state with respect to any such" NAAQS. § 110(a)(2)(D). EPA's determination of the amount of each upwind state's required NOx reduction based on its notion of economic fairness unfairly requires some states to make greater reductions than other states with greater NOx emissions which are having a greater impact downwind. Furthermore, EPA's approach does not necessarily meet the statutory objective of eliminating all NOx emissions from upwind states that are having a significant impact on a downwind state's non-attainment problem. Injecting cost considerations frustrate the purpose of the statute, keeping in mind that the statute's objective is to prevent an upwind state from polluting a downwind state.

EPA acknowledges the holding in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976) that "'Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a [SIP].'" EPA Brief in Opp. 19, citing *Union Electric*, 427 U.S. at 256. EPA, however, suggests that the Court's recognition of possible exceptions to this general rule somehow negates *Union Electric* as authority for precluding "EPA from considering economic and technological factors when taking actions under Section 110(a)(2)(D)." EPA Brief in Opp. 19. The exception acknowledged by the Court, however, applied under § 110(a)(2)(A) which allowed EPA to consider costs to force a state to attain a NAAQS more promptly than the 3-year, technology-forcing deadline mandated in that section. The basis for such an exception rested upon the statutory language that a plan implementing a NAAQS provide for the attainment of such primary standard as "*expeditiously as practicable* but . . . in no case later than three years from the date of approval of such plan . . . ." (Emphasis added.) By contrast, § 110(a)(2)(E), [now § 110(a)(2)(D)], contained no such language that explicitly or implicitly provided for any consideration of economic or technological feasibility. In short, EPA fails to show how any exception as recognized under *Union Electric* to the general prohibition against cost consideration applies to § 110(a)(2)(D), the interstate transport provision.

No matter how laudable some may find EPA's attempt to inject its notion of economic fairness into its authority under § 110(k)(5) to enforce § 110(a)(2)(D), Congress granted EPA no authority to pursue such a goal in enforcing § 110(a)(2)(D). EPA is not free to pursue goals other than those designated under its grant of authority in the statute. On page 14 of its brief, EPA recognizes that cases such as *American Petroleum Institute v. EPA*, 52 F.3rd 1113 (D.C. Cir. 1995), and *Ethyl Corp. v. EPA*, 51 F.3rd 1053 (D.C. Cir 1995) hold "that, where a statutory provision unambiguously confines an agency's authority to the satisfaction of a specified goal, or to the consideration of a specified factor, the agency is not at liberty to take regulatory action under that provision to effectuate other goals, or to base its decision on other factors." EPA Brief in Opp. 14. EPA claims that it did not violate that principle. EPA, however, did violate that principle because in determining the different amounts of NOx reductions which EPA required each of the different upwind states to achieve, EPA did not focus on the "significant contribution" that each upwind state's NOx emissions were making downwind, but instead made the determination based on its own notion of economic fairness, a goal that is neither stated nor inferred in § 110(a)(2)(D).

In its brief, EPA attempts to distinguish the cases cited by the Michigan petitioners in support of their position that EPA cannot consider the cost of controls under § 110(a)(2)(D). EPA cites another set of cases as alleged authority that EPA can consider costs under § 110(a)(2)(D). Petitioners believe that EPA's cases do not apply, however, the point is that certiorari should be granted in this case in order to clarify whether EPA can consider costs in issuing a SIP Call to enforce § 110(a)(2)(D).

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